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(c) *Appointment procedures for non-Chair MRP members.* (1) The appointments of the two non-Chair MRP members will be made by the Secretary after he or she considers any lists of nominees submitted by labor organizations that represent employees in the Department of Homeland Security.

(2) The submission of lists of recommended nominees by labor organizations must be in accordance with timelines and requirements set forth by the Secretary, who may provide for additional consultation in order to obtain further information about a recommended nominee. The ability of the Secretary to appoint MRP members may not be delayed or otherwise af-

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ected by the failure of any labor organization to provide a list of nominees that meets the timeframe and requirements established by the Secretary.

§ 9701.709 Actions involving discrimination.

Section 7702 of title 5, U.S. Code, is modified to read “MSPB or MRP” wherever the terms “Merit Systems Protection Board” or “Board” are used.

§ 9701.710 Savings provision.

This subpart does not apply to adverse actions proposed prior to the date of an affected employee’s coverage under this subpart.

CHAPTER XCIX—DEPARTMENT OF DEFENSE HUMAN RESOURCES MANAGEMENT AND LABOR RELATIONS SYSTEMS (DEPARTMENT OF DEFENSE—OFFICE OF PERSONNEL MANAGEMENT)

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PART 9901—DEPARTMENT OF DEFENSE NATIONAL SECURITY PERSONNEL SYSTEM (NSPS)

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AUTHORITY: 5 U.S.C. 9902; sec. 1106(b), Pub. L. 110-181, 122 Stat. 3.

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Subpart A—General Provisions

§ 9901.101 Purpose.

(a) This part contains regulations governing the National Security Personnel System (NSPS) within the Department of Defense (DoD), as authorized by 5 U.S.C. 9902. Consistent with 5 U.S.C. 9902, as amended by section 1106 of the National Defense Authorization Act for Fiscal Year 2008 (NDAA 2008), these regulations waive or modify various statutory provisions that would otherwise be applicable to affected DoD employees. These regulations are prescribed jointly by the Secretary of Defense and the Director of the Office of Personnel Management (OPM). The Secretary may establish implementing issuances to supplement any matter covered by these regulations.

(b)(1) This part is designed to meet a number of essential requirements for the implementation of a new human resources management system for DoD. The guiding principles for establishing these requirements are to put mission first; respect the individual; protect rights guaranteed by law; support the statutory merit system principles in 5 U.S.C. 2301; value talent, performance, leadership, and commitment to public service; be flexible, understandable, credible, responsive, and executable; ensure accountability at all levels; balance human resources system interoperability with unique mission requirements; and be competitive and cost effective.

(2) The key operational characteristics and requirements of NSPS, which these regulations are designed to facilitate, are as follows: *High-Performing Workforce and Management*—employees

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and supervisors are compensated and retained based on their performance and contribution to mission; *Agile and Responsive Workforce and Management*—workforce can be easily sized, shaped, and deployed to meet changing mission requirements; *Credible and Trusted*—system assures openness, clarity, accountability, and adherence to the public employment principles of merit and fitness; *Fiscally Sound*—aggregate increases in civilian payroll, at the appropriations level, will conform to OMB fiscal guidance; *Supporting Infrastructure*—information technology support, and training and change management plans are available and funded; and *Schedule*—NSPS will be operational and demonstrate success prior to November 2009.

§ 9901.102 Eligibility and coverage.

(a) Pursuant to the provisions of 5 U.S.C. 9902, civilian employees of DoD are eligible for coverage under one or more of subparts B through D of this part, except to the extent specifically prohibited by law.

(b) At his or her sole and exclusive discretion, the Secretary may decide to apply subparts B through D to a specific category or categories of eligible civilian employees in organizations and functional units of the Department at any time in accordance with the provisions of 5 U.S.C. 9902, except that no more than 100,000 employees per year may be moved into NSPS. However, no category of employees may be covered by subparts B or C of this part unless that category is also covered by subpart D of this part. DoD will advise OPM in advance regarding the extension of NSPS coverage to specific categories of DoD employees under this paragraph. The Secretary will notify affected employees and labor organizations in accordance with the requirements of 5 U.S.C. chapter 71 regarding a decision to extend NSPS coverage to any bargaining unit employees.

(c) Until the Secretary makes a determination under paragraph (b) of this section to apply the provisions of one or more subparts of this part to a particular category or categories of eligible employees in organizations and functional units, those employees will

continue to be covered by the applicable Federal laws and regulations that would apply to them in the absence of this part. All personnel actions affecting DoD employees will be based on the Federal laws and regulations applicable to them on the effective date of the action.

(d) Any new NSPS classification, pay, and performance management system covering Senior Executive Service (SES) members will be consistent with the policies and procedures established by the Governmentwide SES pay-for-performance framework authorized by 5 U.S.C. chapter 53, subchapter VIII, and applicable OPM regulations. If the Secretary determines that SES members employed by DoD should be covered by classification, pay, and performance management provisions that differ substantially from the Governmentwide SES pay-for-performance framework, the Secretary and the Director will issue joint regulations consistent with all of the requirements of 5 U.S.C. 9902.

(e) At his or her sole and exclusive discretion, the Secretary may decide to rescind the application of one or more subparts of this part to a particular category of employees or an organization or functional unit, subject to § 9901.372 and any related implementing issuances. The Secretary will notify affected employees and labor organizations in advance of a decision to rescind the application of one or more subparts of this part to them.

(f)(1) Notwithstanding any other provision of this part, but subject to paragraphs (f)(2) and (3) of this section, the Secretary may, at his or her sole and exclusive discretion, decide to apply one or more subparts of this part as of a specified effective date to a category of employees in organizational and functional units not currently eligible for coverage because of coverage under a system established by a provision of law outside the waivable or modifiable chapters of title 5, U.S. Code.

(2) Paragraph (f)(1) of this section applies only if the provision of law outside those waivable or modifiable title 5 chapters provides discretionary authority to cover employees under a given waivable or modifiable title 5 chapter or to cover them under a sepa-

rate system established by the Secretary.

(3) In applying paragraph (f)(1) of this section with respect to coverage under subparts B and C of this part, the affected employees will be converted directly to the NSPS pay system from their current pay system. The conversion of such employees into NSPS will be governed by the rules in §§ 9901.231 and 9901.371 and applicable implementing issuances prescribed by the Secretary under §§ 9901.231(b) and 9901.371(b).

§ 9901.103 Definitions.

In this part:

Appraisal period means the period of time for reviewing employee performance (as described in § 9901.411).

Band means *pay band*.

Basic pay means an employee's pay before any deductions and exclusive of additional pay of any kind, except as expressly provided by applicable law or regulation. For the specific purposes prescribed in § 9901.331(d) only, basic pay includes any local market supplement. In subpart C, when basic pay is exclusive of any additional pay, the term "base salary" is used, and when basic pay includes a local market supplement, the term "adjusted salary" is used.

Career group means a grouping of one or more associated or related occupations. A career group may include one or more pay schedules.

Comparable pay band or *comparable level of work* means pay bands with the equivalent level of work, based on the NSPS classification structure, within and across varying pay schedules and career groups, regardless of the specific earning potential of the bands. When moving from a non-NSPS position to NSPS, the band of the NSPS position is determined to be at a comparable level of work to the grade or level of the non-NSPS position based on application of the NSPS classification structure, as described in implementing issuances.

Competencies means the measurable or observable knowledge, skills, abilities, behaviors, and other characteristics that an individual needs to perform a particular job or job function successfully.

Component means the Office of the Secretary of Defense (OSD), the Military Departments, Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities in the Department of Defense.

Contributing factor means attributes of job performance that are significant to the accomplishment of individual job objectives.

Contribution means a work product, service, output, or result provided or produced by an employee or group of employees that supports the Departmental or organizational mission, goals, or objectives.

Day means a calendar day, unless expressly provided otherwise under applicable law or regulations.

Department or DoD means the Department of Defense.

Director means the Director of the Office of Personnel Management.

Employee has the meaning given that term in 5 U.S.C. 2105.

General Schedule or *GS* means the General Schedule classification and pay system established under chapter 51 and subchapter III of chapter 53 of title 5, U.S. Code.

Higher pay band or higher level of work means a pay band designated to be a higher level of work than an employee's currently assigned band, based on the NSPS classification structure, either within or across varying pay schedules and career groups, regardless of the specific earning potential of the band. When moving from a non-NSPS position to NSPS, the band of the NSPS position is determined to be at a higher level of work than the grade or level of the non-NSPS position based on application of the NSPS classification structure, as described in implementing issuances.

Implementing issuance(s) means a document or documents issued by the Secretary, Deputy Secretary, Principal Staff Assistants (as authorized by the Secretary), or Secretaries and Under Secretaries of the Military Departments to establish or carry out a policy or procedure implementing this part. These issuances may apply De-

partment-wide or to any part of DoD as determined by the Secretary.

Job objective means an expression of performance expectations in the performance plan that is aligned with the organization's goal(s) and mission(s).

Lower pay band or lower level of work means a pay band designated to be a lower level of work than an employee's currently assigned band, based on the NSPS classification structure, either within or across varying pay schedules and career groups, regardless of the specific earning potential of the band. When moving from a non-NSPS position to NSPS, the band of the NSPS position is determined to be at a lower level of work than the grade or level of the non-NSPS position based on application of the NSPS classification structure, as described in implementing issuances.

Military Department means the Department of the Army, the Department of the Navy, or the Department of the Air Force.

National Security Personnel System (NSPS) means the human resources management system established under 5 U.S.C. 9902(a) and the regulations in this part.

Occupational series means a group or family of positions performing similar types of work. Occupational series are assigned a number for workforce information purposes (e.g., 0110, Economist Series; 1410, Librarian Series).

OPM means the Office of Personnel Management.

Pay band or band means a work level and associated pay range within a pay schedule.

Pay pool means the organizational elements/units or other categories of employees that are combined for the purpose of determining performance payouts. Each employee is in only one pay pool at a time. *Pay pool* also refers to the funds designated for performance payouts to employees covered by a pay pool.

Pay Pool Manager means the management official designated to manage the pay pool, resolve discrepancies, ensure consistency and equity within the pay pool, and approve recommendations concerning employee rating of record,

share assignment, and payout distribution between base salary increases and bonuses.

Pay Pool Panel means management officials of the organizations or functions represented in the pay pool who assist the Pay Pool Manager in the reconciliation of recommended ratings of record, share assignments, and payout distribution. The Pay Pool Panel includes the Pay Pool Manager.

Pay schedule means a set of related pay bands for a specified category of employees within a career group.

Performance means accomplishment of work assignments or responsibilities and contribution to achieving organizational goals, including an employee's behavior and professional demeanor (actions, attitude, and manner of performance), as demonstrated by his or her approach to completing work assignments.

Performance Review Authority means one or more management officials who manage and oversee the operation of one or more pay pools and ensure procedural and funding consistency among pay pools under its authority.

Principal Staff Assistants means senior officials of the Office of the Secretary who report directly to the Secretary or Deputy Secretary of Defense.

Promotion means the movement of an employee from one pay band to a higher pay band while continuously employed. This includes movement of an employee currently covered by a non-NSPS Federal personnel system to an NSPS position determined to be at a higher level of work.

Rating of record means the final numerical rating and associated narrative justification assigned to a performance appraisal by a Pay Pool Manager—

(1) After completion of an appraisal period covering an employee's performance of assigned duties against performance expectations over the applicable period; or

(2) As needed following an unacceptable rating of record to reflect a substantial and sustained change in the employee's performance since the last rating of record.

Reassignment means the movement of an employee, either employee-initiated or management-directed, to a different position or set of duties in the same or

a comparable pay band while continuously employed. This includes the movement of an employee currently covered by a non-NSPS Federal personnel system to an NSPS position determined to be at a comparable level of work.

Reduction in band means the voluntary or involuntary movement of an employee from one pay band to a lower pay band on a permanent basis while continuously employed. This includes movement of an employee currently covered by a non-NSPS Federal personnel system to an NSPS position determined to be at a lower level of work.

Secretary means the Secretary of Defense, consistent with 10 U.S.C. 113.

SES means the Senior Executive Service established under 5 U.S.C. chapter 31, subchapter II.

SL/ST refers to an employee serving in a senior-level position paid under 5 U.S.C. 5376. The term "SL" identifies a senior-level employee covered by 5 U.S.C. 3324 and 5108. The term "ST" identifies an employee who is appointed under the special authority in 5 U.S.C. 3325 to a scientific or professional position established under 5 U.S.C. 3104.

Unacceptable performance means performance of an employee which fails to meet one or more performance expectations, as amplified through work assignments or other instructions, for which the employee is held individually accountable.

§ 9901.104 Scope of authority.

The authority for this part is 5 U.S.C. 9902. The provisions in the following chapters of title 5, U.S. Code, and any related regulations, may be waived or modified in exercising the authority in 5 U.S.C. 9902:

(a) Chapter 43, dealing with performance appraisal systems;

(b) Chapter 51, dealing with General Schedule job classification;

(c) Chapter 53, dealing with pay for General Schedule employees, and pay for certain other employees, except as provided in § 9901.303; and

(d) Chapter 55, subchapter V, dealing with premium pay, except sections 5544 and 5545b.

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§ 9901.105 OPM coordination and approval.

(a) The Secretary will coordinate with or request approval from OPM in advance, as applicable, regarding the proposed promulgation of certain implementing issuances and certain other actions related to the ongoing operation of the NSPS where such actions could have a significant impact on other Federal agencies and the Federal civil service as a whole. Pre-decisional coordination under paragraph (b) of this section is intended as an internal DoD/OPM matter to recognize the Secretary's special authority to direct the operations of DoD pursuant to title 10, U.S. Code, as well as the Director's institutional responsibility to oversee the Federal civil service system pursuant to 5 U.S.C. chapter 11. Approval from OPM is required in certain circumstances, as provided in paragraph (c) of this section.

(b) DoD will coordinate with OPM prior to—

(1) Establishing or substantially revising career groups, occupational pay schedules, and pay bands under §§ 9901.211 and 9901.212(a);

(2) Establishing alternative or additional qualification standards for a particular occupational series, career group, occupational pay schedule, and/or pay band under § 9901.212(d) that significantly differ from Governmentwide standards;

(3) Establishing alternative or additional occupational series for a particular career group or occupation under § 9901.221(b)(1) that differ from Governmentwide series and/or standards;

(4) Establishing alternative or additional classification criteria for a particular career group or occupation under § 9901.221(b)(1) that differ from Governmentwide classification standards;

(5) Establishing maximum rates of base salary under § 9901.312(a);

(6) Establishing a higher adjusted salary rate cap for a designated category of positions under § 9901.312(d);

(7) Approving waivers under § 9901.313(a)(3) of the normally applicable aggregate compensation limit;

(8) Establishing and adjusting pay ranges for occupational pay schedules

and pay bands under §§ 9901.321(a) and 9901.322;

(9) Determining targeted general salary increases under § 9901.323(a)(2); and

(10) Establishing and adjusting targeted local market supplements under §§ 9901.332(c) and 9901.333(b).

(c) The Secretary will request approval from the Director prior to—

(1) Establishing policies regarding the student loan repayment program under § 9901.303(c) that differ from Governmentwide policies with respect to repayment amounts and service commitments;

(2) Approving waivers of normally applicable premium pay limitations, as authorized under § 9901.362(a)(2);

(3) Determining pay bands for which an FLSA-exempt employee is paid overtime at an hourly rate equal to the employee's adjusted base salary hourly rate, as authorized under § 9901.362(b)(6)(i); and

(4) Establishing new hazardous duty pay categories under § 9901.362(i)(3).

(d) When a matter requiring OPM coordination is submitted to the Secretary for decision, the Director will be provided an opportunity, as part of the Department's normal coordination process, to review and comment on the recommendations and officially concur or nonconcur with all or part of them. The Secretary will take the Director's comments and concurrence/nonconcurrence into account, advise the Director of his or her determination, and provide the Director with reasonable advance notice of the effective date of the matter. Thereafter, the Secretary and the Director may take such action as they deem appropriate, consistent with their respective statutory authorities and responsibilities.

(e) The Secretary and the Director fully expect their staffs to work closely together on the matters specified in this section, before such matters are submitted for official OPM coordination or approval and DoD decision, so as to maximize the opportunity for consensus and agreement before an issue is so submitted.

§ 9901.106 Relationship to other provisions.

(a)(1) The provisions of title 5, U.S. Code, are waived, modified, or replaced

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to the extent authorized by 5 U.S.C. 9902 to conform to the provisions of this part.

(2) This part must be interpreted in a way that recognizes the critical national security mission of the Department, and each provision of this part must be construed to promote the swift, flexible, effective day-to-day accomplishment of this mission, as defined by the Secretary.

(b)(1) For the purpose of applying other provisions of law or Governmentwide regulations that reference provisions under chapters 43, 51, 53, and 55 (subchapter V only), of title 5, U.S. Code, the referenced provisions are not waived but are modified consistent with the corresponding regulations in this part, except as otherwise provided in this part (including paragraph (c) of this section) or in implementing issuances.

(2) If another provision of law or Governmentwide regulations require coverage under one of the chapters modified or waived under this part (*i.e.*, chapters 43, 51, 53, and 55 (subchapter V only) of title 5, U.S. Code), DoD employees are deemed to be covered by the applicable chapter notwithstanding coverage under a system established under this part. Selected examples of provisions that continue to apply to any DoD employees (notwithstanding coverage under subparts B through D of this part) include, but are not limited to, the following:

(i) Foreign language awards for law enforcement officers under 5 U.S.C. 4521 through 4523;

(ii) Pay for firefighters under 5 U.S.C. 5545b; and

(iii) Recruitment, relocation, and retention payments under 5 U.S.C. 5753 through 5754.

(c)(1) Law enforcement officer special base rates under section 403 of the Federal Employees Pay Comparability Act of 1990 (section 529 of Pub. L. 101-509) do not apply to employees who are covered by an NSPS classification and pay system established under subparts B and C of this part.

(2) Physicians' comparability allowances under 5 U.S.C. 5948 do not apply to employees covered by an NSPS classification and pay system established under subparts B and C of this part.

(d) Nothing in this part waives, modifies or otherwise affects the employment discrimination laws that the Equal Employment Opportunity Commission (EEOC) enforces under 42 U.S.C. 2000e *et seq.*, 29 U.S.C. 621 *et seq.*, 29 U.S.C. 791 *et seq.*, and 29 U.S.C. 206(d).

§ 9901.107 Program evaluation.

The Secretary will evaluate the regulations in this part and their implementation.

Subpart B—Classification

GENERAL

§ 9901.201 Purpose.

(a) This subpart establishes a classification structure and rules for covered DoD employees and positions to replace the classification structure and rules in 5 U.S.C. chapter 51, in accordance with the merit system principle that equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and with appropriate incentives and recognition provided for excellence in performance.

(b) The basis for determining the appropriate classification under NSPS is the primary duties and responsibilities of the position, level of difficulty, occupational qualifications, competency requirements, mission of the organization, and relationship of the position to other positions or organizational levels.

(c) Any classification system prescribed under this subpart will be established in conjunction with the pay system described in subpart C of this part.

§ 9901.202 Coverage.

(a) This subpart applies to eligible DoD employees and positions listed in paragraph (b) of this section, subject to a determination by the Secretary under § 9901.102(b) or (f).

(b) The following employees of, or positions in, DoD organizational and functional units are eligible for coverage under this subpart:

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(1) Employees and positions that would otherwise be covered by the General Schedule classification system established under 5 U.S.C. chapter 51;

(2) Employees in senior-level (SL) and scientific or professional (ST) positions who would otherwise be covered by 5 U.S.C. 5376;

(3) Members of the Senior Executive Service (SES) who would otherwise be covered by 5 U.S.C. chapter 53, subchapter VIII, subject to § 9901.102(d); and

(4) Such others designated by the Secretary as DoD may be authorized to include under 5 U.S.C. 9902.

§ 9901.203 Waivers.

(a) When a specified category of employees is covered by a classification system established under this subpart, the provisions of 5 U.S.C. chapter 51 are waived with respect to that category of employees, except as provided in paragraph (b) of this section, §§ 9901.106, and 9901.222(d) (with respect to OPM's authority to act on requests for classification decisions under 5 U.S.C. 5112(b) and review of pay plans under 5 U.S.C. 5103).

(b) Section 5108 of title 5, U.S. Code, dealing with the classification of positions above GS-15, is not waived for the purpose of defining and allocating Senior Executive Service (SES) positions under 5 U.S.C. 3132 and 3133 or applying provisions of law outside the waivable and modifiable chapters of title 5, U.S. Code—e.g., 5 U.S.C. 4507 and 4507a (regarding Presidential rank awards), 5 U.S.C. 6303(f) (regarding annual leave accrual for members of the SES and employees in SL/ST positions), and 5 U.S.C. 6304(f) (regarding annual leave ceilings for members of the SES and employees in SL/ST positions).

§ 9901.204 Definitions.

In this subpart:

Band has the meaning given that term in § 9901.103.

Basic pay has the meaning given that term in § 9901.103.

Career group has the meaning given that term in § 9901.103.

Classification, also referred to as job evaluation, means the process of analyzing and assigning a job or position to an occupational series, official title,

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career group, pay schedule, and pay band for pay and other related purposes.

Competencies has the meaning given that term in § 9901.103.

Occupational series has the meaning given that term in § 9901.103.

Official title means the position title prescribed in an NSPS classification standard or by supplemental Component guidance.

Pay band or *band* has the meaning given that term in § 9901.103.

Pay schedule has the meaning given that term in § 9901.103.

Position or *job* means the duties, responsibilities, and related competency requirements that are assigned to an employee.

CLASSIFICATION STRUCTURE

§ 9901.211 Career groups.

For the purpose of classifying positions, the Secretary may establish career groups based on factors such as mission or function; nature of work; qualifications or competencies; career or pay progression patterns; relevant labor-market features; and other characteristics of those occupations or positions. The Secretary will document in implementing issuances the criteria and rationale for grouping occupations or positions into career groups.

§ 9901.212 Pay schedules and pay bands.

(a) For purposes of identifying relative levels of work and corresponding pay ranges, the Secretary may establish one or more pay schedules within each career group.

(b) Each pay schedule may include one or more pay bands.

(c) The Secretary will document in implementing issuances the definitions for each pay band which specify the type and range of difficulty and responsibility, qualifications or competencies, or other characteristics of the work encompassed by the pay band.

(d) The Secretary will—

(1) Use qualification standards established or approved by OPM, or establish qualification standards for positions covered by NSPS, subject to § 9901.105(b)(2); and

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(2) Designate qualification standards and requirements for each career group, occupational series, pay schedule, and/or pay band.

CLASSIFICATION PROCESS

§ 9901.221 Classification requirements.

(a) The Secretary will develop a methodology for describing and documenting the duties, qualifications, and other requirements of categories of jobs, and will make such descriptions and documentation available to affected employees.

(b) The Secretary will—

(1) Assign occupational series to jobs consistent with occupational series definitions established by OPM under 5 U.S.C. 5105, or by DoD; and

(2) Apply the criteria and definitions required by §§ 9901.211 and 9901.212 to assign jobs to an appropriate career group, pay schedule, and pay band.

(c) The Secretary will establish procedures for classifying jobs and may make such inquiries of the duties, responsibilities, and qualification requirements of jobs as he or she considers necessary for the purpose of this section.

(d) A classification action is implemented by a personnel action, which, for encumbered positions, must be taken within a reasonable period of time following the effective date of the position classification action. For classification actions resulting from a DoD appeal decision, the personnel action must occur within four pay periods following the effective date of the decision, except when a subsequent date is specifically provided in the decision. If a classification action results in a reduction in an employee's pay band or adjusted salary, the employee must be advised, in writing, of the action and proposed effective date of the personnel action at least 7 days before the personnel action is taken. The written notice will inform the employee of the reason for the reclassification, the right to appeal the classification decision, and the time limitations in § 9901.223 within which the appeal must be filed to preserve applicable retroactive benefits.

(e) Except as otherwise provided in this paragraph or required by law, the

effective date of a classification action is the date the authorized management official certifies the classification decision (*i.e.*, signs or electronically validates the position description).

(1) A retroactive effective date for a classification action and the implementing personnel action is permitted only if the action resulted in a reduction in pay band or adjusted salary and if that action is subsequently reversed on appeal.

(2) In order for a corrective action to be retroactive, the employee must file an initial request for review of the classification action with DoD or OPM not later than 15 calendar days after the personnel action effective date for the reduction in pay band or adjusted salary.

(3) A retroactive date may be established only if the appeal reversal is based on the duties and responsibilities performed at the time of reduction. Retroactive action is mandatory under these circumstances.

§ 9901.222 Review of classification decisions.

(a) An individual employee may request that DoD or OPM review the classification (*i.e.*, pay system, career group, occupational series, official title, pay schedule, or pay band) of his or her official position of record at any time.

(b) Under this section, an employee may not appeal to either DoD or OPM the issues designated as nonappealable to the Office of Personnel Management in 5 CFR 511.607 or the accuracy of NSPS pay schedule and pay band classification criteria. Additional nonappealable issues covered under NSPS include—

(1) Classification of a proposed position or one to which the employee is not officially assigned;

(2) Classification of a position to which an employee is detailed, temporarily reassigned, or temporarily promoted, except for employees serving under a time-limited promotion or reassignment for 2 years or more;

(3) Accuracy of the official position description, including the inclusion or exclusion of a duty (subject to paragraph (c) of this section);

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(4) Classification of a position based on position-to-position comparisons rather than the NSPS classification criteria;

(5) Classification of a position for which a DoD or an OPM appeal decision was previously rendered unless there is a later change in the governing classification criteria or a material change in the requirements of the position; and

(6) The accuracy of career group, pay band, or pay schedule classification criteria or standards contained in DoD issuances.

(c) When the accuracy of the official position description is questioned by the employee, the employee will be advised to raise this issue informally with the employee's supervisor or file a grievance using the applicable administrative or negotiated grievance procedure. If the employee elects to first raise this issue with the employee's supervisor and the employee and the supervisor cannot resolve this issue, the accuracy of the position description may be determined using the applicable administrative or negotiated grievance procedure. If, after completing this procedure, the issue is not resolved, the classification appeal, if any, will be decided on the basis of the actual duties and responsibilities assigned by management and performed by the employee.

(d) An employee may request that OPM review a DoD determination made under paragraph (a) of this section. If an employee does not request an OPM review, DoD's classification determination is final and not subject to further review or appeal.

(e) Any determination made under this section will be based on criteria issued by the Secretary.

§ 9901.223 Appeal to DoD for review of classification decisions.

(a) *Employee representation.* An employee may designate in writing a representative of his or her choice to assist in the preparation and presentation of an appeal. A management official may disallow an employee's representative when—

(1) An individual's activities as a representative would cause a conflict of interest or position;

(2) An employee cannot be released from his or her official duties because of the priority needs of the Government; or

(3) An employee's release would give rise to unreasonable costs to the Government.

(b) *DoD classification appeal process.*

(1) Employee appeals to DoD must be submitted through the employee's servicing Human Resources Office.

(2) An employee may file a classification appeal at any time. When the issue involves a classification action that resulted in a reduction in band or adjusted salary, to preserve any entitlement to retroactive pay, the employee must file any DoD classification appeal no later than 15 calendar days after the effective date of the personnel action. When an employee shows that he or she did not receive notice of the applicable time limit, or personnel action, or was prevented from timely filing by circumstances beyond the employee's control, the deciding official may grant an extension of the appeal period.

(3) An employee must provide the following documentation when filing an appeal:

(i) The employee's name, mailing address, and office telephone and fax numbers;

(ii) The employing Component and the exact location of the employee's position within the Component (installation name, mailing address, organization, division, branch, section, unit);

(iii) The name, address, and business telephone and fax numbers of the employee's representative, if any;

(iv) A statement of the employee's requested pay system, official position title, occupational series, pay schedule, and/or pay band; and

(v) Reasons why the employee believes the position is incorrectly classified.

(4) The employee must refer to classification standards that support the appeal and state specific points of disagreement with the current classification. The employee may also include a statement of facts that he or she thinks may affect the final classification decision.

(c) *Binding decisions.* DoD appeal decisions constitute certificates that are

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binding on all administrative, certifying, payroll, disbursing, and accounting offices within DoD.

(d) *Cancellation.* (1) An employee or representative may cancel an appeal at any time before DoD issues a decision by providing written notification to the DoD deciding official.

(2) DoD may cancel an appeal if any of the following occur:

(i) The employee, or his or her representative, does not furnish requested information within the required time period;

(ii) The employee is no longer officially assigned to, or is removed from, the position and there is no entitlement to retroactive benefits;

(iii) The duties and responsibilities of the position are significantly changed while the case is pending and there is no entitlement to retroactive benefits; or

(iv) The position is abolished and there is no entitlement to retroactive benefits.

§ 9901.224 Appeal to OPM for review of classification decisions.

(a) An employee's request for OPM review of DoD classification determination will follow the procedures in 5 CFR part 511, subpart F—Classification Appeals.

(b) Effective dates of OPM classification appeal decisions will be consistent with 5 CFR 511.702.

(c) Employee appeals to OPM may be submitted directly to OPM.

(d) OPM's final determination on an appeal made under this section is not subject to further review or appeal.

TRANSITIONAL PROVISIONS

§ 9901.231 Conversion of positions and employees to NSPS classification system.

(a) *Introduction.* This section describes the transitional provisions that apply when DoD positions and employees initially are converted to a classification system established under this subpart. (See § 9901.371 for conversion rules related to setting an employee's pay.) Positions and employees in affected organizational or functional units may convert from the GS system, the SL/ST system, the SES system, or such other DoD systems as may be des-

ignated by the Secretary, as provided in § 9901.202. For the purpose of this part, the terms "convert," "converted," "converting," and "conversion" refer to positions and employees that become covered by the NSPS classification system as a result of a coverage determination made under § 9901.102(b) and excludes employees who move from a noncovered position to a position already covered by NSPS.

(b) *Implementing issuances.* The Secretary will issue implementing issuances prescribing policies and procedures for converting DoD employees to a pay band upon initial implementation of the NSPS classification system. Those issuances will establish the work level conversion tables used to place an employee in a pay band based on the level of work of the employee's position in the formerly applicable pay system.

(c) *Temporary promotion prior to conversion.* An employee on a temporary promotion at the time of conversion will be returned to his or her official position of record prior to processing the conversion. That official position of record (including occupational series and grade) is used in determining the employee's career group, pay schedule, and band upon conversion.

(d) *Grade retention prior to conversion.* For an employee who is entitled to grade retention immediately before conversion, the grade of the actual position of record (not the grade being retained) is used in determining the employee's band upon conversion.

Subpart C—Pay and Pay Administration

GENERAL

§ 9901.301 Purpose.

(a) This subpart contains regulations establishing pay structures and pay administration rules for covered DoD employees to replace the pay structures and pay administration rules established under 5 U.S.C. chapter 53 and 5 U.S.C. chapter 55, subchapter V, as authorized by 5 U.S.C. 9902 (subject to the limitations on waivers in § 9901.303).

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Various features that link pay to employees' performance ratings are designed to promote a high-performance culture within DoD.

(b) Any pay system prescribed under this subpart will be established in conjunction with the classification system described in subpart B of this part.

(c) Any pay system prescribed under this subpart will be established in conjunction with the performance management system described in subpart D of this part.

§ 9901.302 Coverage.

(a) This subpart applies to eligible DoD employees and positions in the categories listed in paragraph (b) of this section, subject to a determination by the Secretary under § 9901.102(b) or (f).

(b) The following employees of, or positions in, DoD organizational and functional units are eligible for coverage under this subpart:

(1) Employees and positions who would otherwise be covered by the General Schedule pay system established under 5 U.S.C. chapter 53, subchapter III;

(2) Employees in senior-level (SL) and scientific or professional (ST) positions who would otherwise be covered by 5 U.S.C. 5376;

(3) Members of the Senior Executive Service (SES) who would otherwise be covered by 5 U.S.C. chapter 53, subchapter VIII, subject to § 9901.102(d); and

(4) Such others designated by the Secretary as DoD may be authorized to include under 5 U.S.C. 9902.

§ 9901.303 Waivers.

(a) When a specified category of employees is covered under this subpart—

(1) The provisions of 5 U.S.C. chapter 53 are waived with respect to that category of employees, except as provided in § 9901.106 and paragraphs (b) and (c) of this section; and

(2) The provisions of 5 U.S.C. chapter 55, subchapter V (except sections 5544 and 5545b), are waived with respect to that category of employees to the extent that those employees are covered by alternative premium pay provisions established by the Secretary under §§ 9901.361 through 9901.364 in lieu of the

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provisions in 5 U.S.C. chapter 55, subchapter V.

(b) The following provisions of 5 U.S.C. chapter 53 are not waived:

(1) Sections 5311 through 5318, dealing with Executive Schedule positions;

(2) Sections 5341 through 5349, dealing with prevailing rate systems;

(3) Section 5371, insofar as it authorizes OPM to apply the provisions of 38 U.S.C. chapter 74 to DoD employees in health care positions covered by section 5371 in lieu of any NSPS classification and pay system established under this part or the following provisions of title 5, U.S. Code: chapters 51, 53, and 61, and subchapter V of chapter 55. The reference to “chapter 51” in section 5371(c) is deemed to include a classification system established under subpart B of this part; and

(4) Section 5377, dealing with the critical pay authority.

(c) Section 5379 continues to apply but is modified to allow the Secretary to modify the minimum service period and the limitations on the amount of student loan benefits in order to address critical hiring needs, subject to § 9901.105.

§ 9901.304 Definitions.

In this subpart:

Adjusted salary means an NSPS employee's base salary plus any local market supplement paid to that employee. For an employee moving into NSPS from a non-NSPS position, *adjusted salary* also refers to non-NSPS base salary plus any applicable locality pay under 5 U.S.C. 5304, special rate supplement under 5 U.S.C. 5305, or any equivalent supplement.

Band has the meaning given that term in § 9901.103.

Base salary means an NSPS employee's pay, as set by the authorized management official, before deductions and exclusive of additional pay of any kind (e.g., local market supplement). For an employee moving into NSPS from a non-NSPS position, *base salary* also refers to non-NSPS pay, before deductions and exclusive of additional pay of any kind (e.g., locality pay or a special rate supplement).

Basic pay has the meaning given that term in § 9901.103.

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Bonus means an element of the performance payout that consists of a one-time lump-sum payment made to employees. It is not part of basic pay for any purpose.

Career group has the meaning given that term in § 9901.103.

Comparable pay band or *comparable level of work* has the meaning given in § 9901.103.

Competencies has the meaning given that term in § 9901.103.

Component has the meaning given that term in § 9901.103.

Contributing factor has the meaning given that term in § 9901.103.

Contribution has the meaning given that term in § 9901.103.

Contribution assessment means the determination made by the Pay Pool Manager as to the impact, extent, and scope of contribution that the employee's performance made to the accomplishment of the organization's mission and goals.

CONUS or *Continental United States* means the States of the United States, excluding Alaska and Hawaii, but including the District of Columbia.

Day has the meaning given that term in § 9901.103.

Department or *DoD* has the meaning given in § 9901.103.

Employee has the meaning given that term in § 9901.103.

General Schedule or *GS* has the meaning given that term in § 9901.103.

Implementing issuance(s) has the meaning given that term in § 9901.103.

Local market supplement means a geographic- and occupation-based supplement paid in addition to an employee's base salary, including a standard local market supplement or a targeted local market supplement, as described in § 9901.332.

Modal rating means, for the purpose of pay administration, the most frequent rating of record assigned to employees within a particular pay pool for a particular rating cycle.

National Security Personnel System (NSPS) has the meaning given that term in § 9901.103.

Occupational series has the meaning given that term in § 9901.103.

OPM has the meaning given that term in § 9901.103.

Official worksite has the meaning given that term in 5 CFR 531.605.

Pay band or *band* has the meaning given that term in § 9901.103.

Pay pool has the meaning given that term in § 9901.103.

Pay Pool Manager has the meaning given that term in § 9901.103.

Pay Pool Panel has the meaning given that term in § 9901.103.

Pay schedule has the meaning given that term in § 9901.103.

Performance has the meaning given that term in § 9901.103.

Performance payout means the total monetary value of a performance pay increase and bonus provided under § 9901.342.

Performance Review Authority has the meaning given that term in § 9901.103.

Performance share means a unit of performance payout awarded to an employee based on performance. Performance shares may be awarded in multiples based on the employee's rating of record and specified factors, as provided in § 9901.342(f).

Performance share value means a calculated value for each performance share based on pay pool funds available and the distribution of performance shares across employees within a pay pool, expressed as a percentage of base salary.

Premium pay means payments for work performed under special conditions or circumstances, as authorized under 5 U.S.C. chapter 55, subchapter V, or §§ 9901.361 through 9901.364 (including compensatory time off).

Promotion has the meaning given that term in § 9901.103.

Rate range means the range of base salary rates applicable to employees in a particular pay band, as described in § 9901.321. Each rate range is defined by a minimum and maximum base salary rate.

Rating of record has the meaning given that term in § 9901.103.

Reassignment has the meaning given that term in § 9901.103.

Reduction in band has the meaning given that term in § 9901.103.

Retained rate means a retained base salary rate (*i.e.*, excluding any local market supplement) above the applicable pay band maximum rate as established for an NSPS employee under the

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pay retention provisions in § 9901.356. For GS employees, *retained rate* has the meaning given that term in 5 CFR part 536.

Secretary has the meaning given that term in § 9901.103.

Standard local market supplement means the local market supplement that applies to employees in a given pay schedule or band who are stationed within a specified local market area (the boundaries of which are defined under § 9901.332(b)), unless a targeted local market supplement applies. Standard local market supplements are generally administered for covered employees in the same manner as locality-based comparability payments under 5 U.S.C. 5304 and 5304a.

Sub pay pool means a subset of a pay pool that is defined for the purpose of reconciling ratings of record, share assignments, and payout determinations.

Targeted local market supplement means a local market supplement established to address recruitment or retention difficulties or for other appropriate reasons and which applies to a defined category of employees (based on occupation or other appropriate factors) in lieu of any lower standard local market supplement that would otherwise apply.

Unacceptable performance has the meaning given that term in § 9901.103.

§ 9901.305 Rate of pay.

(a) The term “rate of pay” in 5 U.S.C. 9902(e)(9) means—

(1) An individual employee’s base salary rate, local market supplement rate, and overtime and other premium pay rates (including compensatory time off); and

(2) The rates comprising the structure of the pay system that govern the setting and adjusting of the individual employee rates identified in paragraph (a)(1) of this section, including, but not limited to—

(i) Band rate range minimum and maximum rates;

(ii) Control points within a band rate range;

(iii) Local market supplement rates;

(iv) Maximum rates of base salary and adjusted salary;

(v) Premium pay rates; and

(vi) The percentage rate of total base salary payroll constituting the portion of a pay pool applied to provide performance-based increases in employees’ base salary rates.

(b) For the purpose of 5 U.S.C. 9902(e)(9), the establishment or adjustment of a rate of pay includes the establishment or adjustment of the amount or level of the rate and of the eligibility requirements associated with the type and level of pay in question. Illustrative examples of actions that establish or adjust a rate of pay include, but are not limited to, the following:

(1) Establishing the starting base salary rate for a newly hired employee;

(2) Establishing a retained rate for an employee under § 9901.356(e);

(3) Adjusting an employee’s base salary rate through various pay actions, including general salary increases, targeted general salary increases, performance pay increases, extraordinary performance recognition increases, organizational or team achievement recognition increases, pay reductions for unacceptable performance or conduct, reassignment increases and decreases, promotion increases, within-grade increase adjustments, and accelerated compensation for developmental positions (ACDP) increases;

(4) Establishing or adjusting the minimum or maximum rate of a band rate range or control points within that range;

(5) Establishing or adjusting the percentage amount of a targeted local market supplement, as well as the geographic area and other coverage requirements associated with that supplement;

(6) Establishing a higher premium pay limit under § 9901.362(a)(2);

(7) Establishing an overtime rate equal to an employee’s adjusted salary rate under § 9901.362(b)(6)(i);

(8) Establishing a new hazardous duty premium rate under 9901.362(i)(3); and

(9) Establishing the percentage rate of total base salary payroll constituting the portion of a pay pool applied to provide performance-based increases in employees’ base salary rates.

OVERVIEW OF PAY SYSTEM

§ 9901.311 Major features.

Through the issuance of implementing issuances, the Secretary will further define a pay system that governs the setting and adjusting of covered employees' rates of base salary and adjusted salary and the setting of covered employees' rates of premium pay. The NSPS pay system will include the following features:

(a) A structure of rate ranges linked to various pay bands for each career group, in alignment with the classification structure described in subpart B of this part;

(b) Policies regarding the setting and adjusting of band rate ranges based on mission requirements, labor market conditions, and other factors, as described in §§ 9901.321 and 9901.322;

(c) Policies regarding the setting and adjusting of local market supplements as described in §§ 9901.331 through 9901.333;

(d) Policies regarding employees' eligibility for general salary increases and adjustments in local market supplements, as described in §§ 9901.323 and 9901.334;

(e) Policies regarding performance-based pay, as described in §§ 9901.341 through 9901.345;

(f) Policies on base salary administration, including movement between career groups, positions, pay schedules, and pay bands, as described in §§ 9901.351 through 9901.356;

(g) Linkages to employees' ratings of record, as described in subpart D of this part; and

(h) Policies regarding the setting of and limitations on premium payments, as described in §§ 9901.361 through 9901.364.

§ 9901.312 Maximum rates of base salary and adjusted salary.

(a) Subject to § 9901.105, the Secretary may establish a limitation on the maximum rate of base salary provided under authority of this subpart.

(b) No employee may receive, under authority of this subpart, an adjusted salary rate greater than the rate for level IV of the Executive Schedule plus 5 percent. The payable local market supplement for an employee must be

reduced as necessary to comply with this limitation.

(c) Paragraphs (a) and (b) of this section do not apply to physicians and dentists (in occupational series 0602 and 0680, respectively).

(d) Subject to § 9901.105, the Secretary may establish a higher adjusted salary rate limitation for a specified category of positions in lieu of the limitation in paragraph (b) of this section based on mission requirements, labor market conditions, availability of funds, and any other relevant factors.

§ 9901.313 Aggregate compensation limitations.

(a) *General.* (1) Except as provided in paragraphs (a)(2) and (a)(3) of this section, no additional payment (premium pay, allowance, differential, bonus, award, or other similar cash payment) may be paid to an employee in a calendar year if, or to the extent that, when added to the adjusted salary paid to the employee for service performed as an employee in the Department or in another Federal agency, the payment would cause the total aggregate compensation to exceed the annual rate for Executive Level I as in effect on the last day of that calendar year.

(2) In the case of physicians and dentists (in occupational series 0602 and 0680, respectively) payment to the employee may not cause aggregate compensation received in a calendar year to exceed the salary of the President of the United States as in effect on the last day of that calendar year.

(3) Subject to § 9901.105, the Secretary may provide for a higher aggregate compensation limitation equal to the annual rate payable to the Vice President under 3 U.S.C. 104 as in effect on the last day of the calendar year in the case of specified categories of employees for whom a waiver has been authorized under § 9901.362(a)(2).

(4) The limitation described in this paragraph (a) applies to the total amount of aggregate compensation actually received by an employee during the calendar year without regard to the period of service for which such compensation is earned.

(b) *Types of compensation.* For the purpose of this section, aggregate compensation is the total of—

(1) Adjusted salary received as an employee of the Department;

(2) Premium pay under 5 U.S.C. chapter 55, subchapter V, and this subpart;

(3) Incentive awards and performance-based cash awards under 5 U.S.C. 4501–4523 and this part;

(4) Recruitment and relocation incentives under 5 U.S.C. 5753;

(5) Retention incentives under 5 U.S.C. 5754;

(6) Supervisory differentials under 5 U.S.C. 5755;

(7) Post differentials under 5 U.S.C. 5925;

(8) Danger pay allowances under 5 U.S.C. 5928;

(9) Extended assignment incentives under 5 U.S.C. 5757;

(10) Post differentials based on environmental conditions for employees stationed outside the continental United States or in Alaska under 5 U.S.C. 5941(a)(2);

(11) Foreign language proficiency pay under 10 U.S.C. 1596 and 1596a;

(12) Continuation of pay under 5 U.S.C. 8118;

(13) Other similar payments authorized under title 5, United States Code, excluding—

(i) Back pay due to an unjustified personnel action under 5 U.S.C. 5596 (but only if the back payments were originally payable in a previous calendar year);

(ii) Overtime pay under the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201–219 and 5 CFR part 551);

(iii) Severance pay under 5 U.S.C. 5595;

(iv) Nonforeign area cost-of-living allowances under 5 U.S.C. 5941(a)(1); and

(v) Lump-sum payments for accumulated and accrued annual leave on separation under 5 U.S.C. 5551 or 5552; and

(14) Payments received from another agency during the calendar year, prior to employment with the Department, that are subject to 5 U.S.C. 5307.

(c) *Administration of aggregate limitation.* (1) At the time a payment covered by paragraph (b) of this section (other than adjusted salary) is authorized for an employee, the employee may not receive any portion of such payment that, when added to the estimated aggregate compensation the employee is

projected to receive, would cause the aggregate compensation actually received by the employee during the calendar year to exceed the limitation applicable to the employee under this section at the end of the calendar year.

(2) Payments that are creditable for retirement purposes (e.g., law enforcement availability pay (LEAP) or standby premium pay) and that are paid to an employee at a regular fixed rate each pay period may not be deferred or discontinued for any period of time in order to make another payment that would otherwise cause an employee's pay to exceed any limitation described in or established by this section.

(3) Except for physicians and dentists (in occupational series 0602 and 0680, respectively), if the estimated aggregate compensation to which an employee is entitled exceeds the applicable limitation under this section for the calendar year, the Department must defer all authorized payments (other than adjusted salary) at the time when otherwise continuing such payments would cause the aggregate compensation actually received by any employee during the calendar year to exceed the applicable limitation. Any portion of a payment deferred under this paragraph will become available for payment as provided in paragraph (d) of this section. For physicians and dentists (in occupational series 0602 and 0680, respectively), payments that exceed the limitation under paragraph (a)(2) of this section may not be made at any time.

(4) If the Department makes an incorrect estimate of aggregate compensation at an earlier date in the calendar year, the sum of an employee's remaining payments of adjusted salary (which may not be deferred) may exceed the difference between the aggregate compensation the employee has actually received to date in that calendar year and the applicable limitation under this section. In this case, the employee will become indebted to the Department for any amount paid in excess of the aggregate limitation. To the extent that the excess amount is attributable to amounts that should have been deferred and would have been payable at the beginning of the next calendar year, the debt must be

nullified on January 1 of the next calendar year. As part of the correction of the error, the excess amount will be deemed to have been paid on January 1 of the next calendar year (when the debt was extinguished) as if it were a deferred excess payment as described in paragraph (c)(3) of this section and must be considered part of the employee's aggregate compensation for the new calendar year.

(d) *Payment of excess amounts.* (1) Except for physicians and dentists (in occupational series 0602 and 0680, respectively), any amount that is not paid to an employee because of the annual aggregate compensation limitation under this section must be paid in a lump-sum payment at the beginning of the following calendar year. Any amount paid the following calendar year will be taken into account for purposes of applying the limitations with respect to such calendar year. For physicians and dentists (in occupational series 0602 and 0680, respectively), payments that exceed the limitation under paragraph (a)(2) of this section may not be made at any time.

(2) If a lump-sum payment causes an employee's estimated aggregate compensation to exceed the applicable limitation under this section, the Department must consider only the employee's adjusted salary and payments that are creditable for retirement purposes (e.g., LEAP or standby pay) in determining the extent to which the lump-sum payment may be paid and will defer all other payments, in order to pay as much of the excess amount as possible. Any payments deferred under this paragraph, including any portion of the excess amount that was not payable, will become payable at the beginning of the next calendar year.

(3) If an employee moves to another Federal agency or to another position within the Department not covered by NSPS, and, at the time of the move, the employee has received payments in excess of the aggregate limitation under 5 U.S.C. 5307, the employee's indebtedness for the excess amount received will be deferred from the effective date of the transfer until the beginning of the next calendar year. Effective January 1 of the new calendar year, the debt will be nullified and the

excess amount will be considered in applying that year's aggregate limitation.

(4) If an employee transfers to another agency and, at the time of transfer, the employee has excess payments deferred to the next calendar year, the provisions of 5 U.S.C. 5307 are applicable.

(5) The following conditions permit payment of excess aggregate compensation without regard to the calendar year limitation:

(i) If an employee dies, the excess amount is payable immediately as part of the settlement of accounts, in accordance with 5 U.S.C. 5582.

(ii) If an employee separates from Federal service, the entire excess amount is payable following a 30-day break in service. If the individual is re-employed in the Department under NSPS in the same calendar year as separation, any previous payment of an excess amount will be considered part of that year's aggregate compensation for the purpose of applying the limitations described in this section for the remainder of the calendar year.

§ 9901.314 National security compensation comparability.

(a) To the maximum extent practicable, for fiscal years 2004 through 2012, the overall amount allocated for compensation of the DoD civilian employees who are included in the NSPS may not be less than the amount that would have been allocated for compensation of such employees for such fiscal years if they had not been converted to the NSPS, based on, at a minimum—

(1) The number and mix of employees in such organizational or functional units prior to conversion of such employees to the NSPS; and

(2) Adjustments for normal step increases and rates of promotion that would have been expected, had such employees remained in their previous pay schedule.

(b) To the maximum extent practicable, implementing issuances will provide a formula for calculating the overall amount to be allocated for fiscal years beyond fiscal year 2012 for compensation of the civilian employees included in the NSPS. The formula will

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ensure that, in the aggregate, employees are not disadvantaged in terms of the overall amount of compensation available as a result of conversion to the NSPS, while providing flexibility to accommodate changes in the function of the organization and other changed circumstances that might impact compensation levels.

(c) For the purpose of this section, “compensation” for civilian employees means adjusted salary, taking into account any applicable locality payment under 5 U.S.C. 5304, special rate supplement under 5 U.S.C. 5305, local market supplement under § 9901.332, or equivalent supplement under other legal authority.

RATE RANGES AND GENERAL SALARY INCREASES

§ 9901.321 Structure.

(a) Subject to § 9901.105, the Secretary will establish ranges of base salary rates for pay bands, with minimum and maximum rates set and adjusted as provided in § 9901.322.

(b) For each pay band within a career group, the Secretary will establish a common rate range that applies in all locations.

(c) The Secretary may establish and adjust control points within a pay band to manage compensation (e.g., limitations on pay setting and pay progression within a pay band that apply to specified positions). The Secretary may consider only the following factors in developing control points: mission requirements, labor market conditions, and benchmarks against duties, responsibilities, competencies, qualifications, and performance.

§ 9901.322 Setting and adjusting rate ranges.

(a) Subject to § 9901.105, the Secretary may set and adjust the rate ranges (*i.e.*, range minimums and maximums) established under § 9901.321. In determining the rate ranges, the Secretary may consider mission requirements, labor market conditions, availability of funds, pay adjustments received by employees of other Federal agencies, and any other relevant factors.

(b) The Secretary may determine the effective date of newly set or adjusted

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band rate ranges. Established rate ranges will be reviewed for possible adjustment at least annually.

(c) The Secretary may establish different rate ranges and provide different rate range adjustments for different pay bands.

(d) The Secretary may adjust the minimum and maximum rates of a pay band by different percentages.

(e) The maximum rate of each band must be adjusted at the time of a general salary increase under § 9901.323(a)(1) by no less than the percentage amount of the General Schedule annual adjustment under 5 U.S.C. 5303.

§ 9901.323 Eligibility for general salary increase.

(a) Employees with a current rating of record above “unacceptable” (Level 1) and employees who do not have a current rating of record for the most recently completed appraisal period are eligible to receive an approved general salary increase in their base salary rate subject to the following requirements:

(1) A general salary increase must be provided to eligible employees in all NSPS pay bands at the same time that a General Schedule annual adjustment takes effect under 5 U.S.C. 5303. The amount of such general salary increase is determined by the Secretary but may not be less than 60 percent of the General Schedule annual adjustment under 5 U.S.C. 5303 (unless a lesser percentage is allowed by law). Such general salary increase must be the same percentage amount for all eligible employees under NSPS, except that the increase for employees receiving a retained rate is limited to the lowest permitted amount (*i.e.*, 60 percent of the General Schedule annual adjustment under 5 U.S.C. 5303 unless a lesser percentage is allowed by law).

(2) In addition to the general salary increase under paragraph (a)(1) of this section, and subject to § 9901.105, a targeted general salary increase may be provided to all eligible employees (excluding employees receiving a retained rate under § 9901.356) in a designated occupational series or specialty in a pay band if the Secretary determines that

such an increase is necessary considering only labor market conditions, staffing difficulties, cost, and mission priorities. Different targeted general salary increases may be provided under this paragraph (a)(2) to employees in different occupational series, specialties, and/or pay bands.

(b) Employees with a current rating of record of “unacceptable” will not receive a general salary increase under this section. If such an employee receives a rating of record above unacceptable for a subsequent appraisal period, the employee is eligible for any general salary increase taking effect on or after the date the employee is given a rating of record above unacceptable.

(c)(1) The Secretary may provide an additional increase in the base salary rate equal to the difference between the percent of the General Schedule annual adjustment under 5 U.S.C. 5303 and the amount of the NSPS general salary increase under paragraph (a)(1) of this section to employees ineligible for performance payout under § 9901.342. This increase is effective at the same time as the NSPS general salary increase.

(2) The increase under paragraph (c)(1) of this section does not apply to employees who—

(i) Are ineligible for a performance payout due to an NSPS rating of record of Level 1 or Level 2;

(ii) Move from a non-NSPS to an NSPS position, or who are newly hired or reappointed to an NSPS position, on the effective date of the performance payment; or

(iii) Are receiving a retained rate under § 9901.356.

(d) A general salary increase under paragraph (a)(2) or paragraph (c) of this section may be applied only to the extent that it does not cause an employee's base salary rate to exceed the maximum rate of the employee's band or applicable control point.

(e) If the adjustment of a pay band minimum rate causes the base salary of an employee with a rating of record above unacceptable (Level 1) to fall below such minimum rate, the employee's salary will be set at the pay band minimum rate.

LOCAL MARKET SUPPLEMENTS

§ 9901.331 General.

(a) *Introduction.* The base salary ranges established under §§ 9901.321 through 9901.322 may be supplemented in appropriate circumstances by local market supplements, as described in this section. These supplements are set and adjusted as described in § 9901.333. The sum of an employee's base salary plus any applicable local market supplement constitutes the employee's adjusted salary.

(b) *Computation.* Standard local market supplements are computed by multiplying the applicable supplement percentage rate times the employee's base salary rate and rounding the result to the nearest whole dollar. Targeted local market supplements are computed by multiplying the applicable supplement percentage rate times the employee's base salary rate and rounding the result to the nearest whole dollar, or by inclusion of the applicable supplement constant whole dollar amount for eligible employees. A local market supplement is payable only to the extent that it does not cause an employee's adjusted salary rate to exceed the rate limitation described in § 9901.312(b).

(c) *Official worksite.* When a local market supplement is linked to a geographic area, the employee's entitlement to the local market supplement is contingent on the employee's official worksite (as defined in 5 CFR 531.605) being located in that geographic area.

(d) *Treatment as basic pay.* Local market supplements are considered basic pay only for the following purposes:

(1) Retirement deductions, contributions, and benefits under 5 U.S.C. chapter 83 or 84;

(2) Life insurance premiums and benefits under 5 U.S.C. chapter 87;

(3) Premium pay under 5 U.S.C. chapter 55, subchapter V, or similar payments under other legal authority, including this subpart;

(4) Severance pay under 5 U.S.C. 5595;

(5) Cost-of-living allowances and post differentials under 5 U.S.C. 5941;

(6) Overseas allowances and differentials under 5 U.S.C. chapter 59, subchapter III, to the extent authorized by the Department of State;

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(7) Recruitment, relocation, and retention incentives, supervisory differentials, and extended assignment incentives under 5 U.S.C. chapter 57, subchapter IV, and 5 CFR part 575;

(8) Lump-sum payments for accumulated and accrued annual leave under 5 CFR 550, subpart L;

(9) Determining whether an employee's rate of basic pay is reduced at the point of conversion or movement into or out of the NSPS pay system for the purpose of applying 5 U.S.C. chapter 75, subchapter II (dealing with adverse actions), consistent with §§9901.351(g), 9901.371(d), and 9901.372(f);

(10) Other payments and adjustments under other statutory or regulatory authority for which locality-based comparability payments under 5 U.S.C. 5304 are considered part of basic pay; and

(11) Any other provisions for which DoD local market supplements are expressly treated as basic pay by law or under this part.

§ 9901.332 Standard and targeted local market supplements.

(a) *General.* NSPS employees may receive standard or targeted local market supplements as described in paragraphs (b) and (c) of this section. Consistent with 5 U.S.C. 9902(e)(8), the full amount of standard and targeted local market supplements must be provided to employees who receive a rating of record above unacceptable (Level 1) or who do not have a rating of record for the most recently completed appraisal period. As provided in §9901.334, an employee with an unacceptable rating of record may not receive an increase in a standard or targeted local market supplement. Standard local market supplements are designed to satisfy the requirements of 5 U.S.C. 9902(e)(8)(A), while targeted local market supplements are the “other local market supplements” referenced in 5 U.S.C. 9902(e)(8)(B).

(b) *Standard local market supplements.* Employees are entitled to standard local market supplements that are generally equivalent to locality payments under 5 U.S.C. 5304 and 5304a, subject to the following requirements:

(1) The percentage values of standard local market supplements must be identical to the percentage values of

locality payments established under 5 U.S.C. 5304 and 5304a, except as provided in §9901.334 with respect to employees with an unacceptable rating of record;

(2) The geographic areas in which standard local market supplements apply must be identical to the corresponding geographic areas established for locality payments under 5 U.S.C. 5304;

(3) An employee's entitlement to a standard local market supplement is based on whether the employee's official worksite (defined consistent with the requirements in 5 CFR 531.605) is located in the given local market area;

(4) The applicable standard local market supplement is paid on top of a retained rate (consistent with the NSPS modification of the pay retention rules);

(5) The cap on an adjusted salary rate that includes a standard local market supplement is the rate for level IV of the Executive Schedule plus 5 percent (consistent with the NSPS extension of the highest band base rate ranges by 5 percent), as provided in §9901.312(b), except as otherwise provided under §9901.312(d);

(6) A standard local market supplement does not apply if an employee is entitled to a higher targeted local market supplement; and

(7) Standard local market supplements are not applicable to physicians and dentists (in occupational series 0602 and 0680, respectively), since they receive higher base salary and adjusted salary rates (including any applicable targeted local market supplements) to achieve comparability with physicians and dentists paid under 38 U.S.C. chapter 74 and since their adjusted salary rates apply on a worldwide basis.

(c) *Targeted local market supplements.* Subject to §9901.105, the Secretary may establish targeted local market supplements for specifically defined categories of employees in order to address significant recruitment or retention problems. This authority is subject to the following:

(1) The conditions for coverage under a targeted local market supplement may be based on occupation, band, organizational unit, geographic location of official worksite, specializations,

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special skills or qualifications, or other appropriate factors;

(2) A targeted local market supplement applies to an employee eligible for a standard local market supplement only if the targeted local market supplement is a larger amount; and

(3) Except for physicians and dentists (in occupational series 0602 and 0680, respectively) or as otherwise provided under § 9901.312(d), an employee's adjusted salary that includes an applicable targeted local market supplement may not exceed the rate cap equal to the rate for Executive Level IV plus 5 percent, as provided in § 9901.312(b).

§ 9901.333 Setting and adjusting local market supplements.

(a) Standard local market supplements are set and adjusted consistent with the setting and adjusting of corresponding General Schedule locality payments under 5 U.S.C. 5304 and 5304a.

(b) Subject to § 9901.105, the Secretary may set and adjust targeted local market supplements. In determining the amounts of the supplements, the Secretary will consider mission requirements, labor market conditions, cost, and pay adjustments received by employees of other Federal agencies, allowances and differentials under 5 U.S.C. chapter 59, and any other relevant factors. The Secretary may determine the effective date of newly set or adjusted targeted local market supplements. Established supplements will be reviewed for possible adjustment at least annually in conjunction with rate range adjustments under § 9901.322.

§ 9901.334 Eligibility for pay increase associated with a supplement adjustment.

(a) When a local market supplement is adjusted under § 9901.333, employees to whom the supplement applies with current ratings of record above "unacceptable" (Level 1), and employees who do not have current ratings of record for the most recently completed appraisal period, are eligible to receive any pay increase resulting from that adjustment.

(b) An employee with a current rating of record of "unacceptable" will not receive a pay increase under this section (*i.e.*, the employee's local market

supplement percentage will not be increased). Once such an employee has a new rating of record above "unacceptable," the employee is entitled to the full amount of any applicable local market supplement effective on the date of the first adjustment in that local market supplement occurring on or after the effective date of the new rating of record as specified in § 9901.411(d), or, if earlier, the effective date of an applicable general salary increase as described in § 9901.323(b).

PERFORMANCE-BASED PAY

§ 9901.341 General.

Sections 9901.342 through 9901.345 describe the performance-based pay that is part of the pay system established under this subpart. These provisions authorize payments to employees based on individual performance or contribution, or team or organizational performance, as a means of fostering a high-performance culture that supports mission accomplishment.

§ 9901.342 Performance payouts.

(a) *Overview.* (1) The NSPS pay system will be a performance-based pay system and will result in a distribution of available performance pay funds based upon individual performance, individual contribution, team or organizational performance, or a combination of those elements. The NSPS pay system will use a pay pool concept to manage, control, and distribute performance-based pay increases and bonuses. The performance payout is a function of the amount of money in the performance pay pool and the number of shares assigned to individual employees.

(2) The rating of record used as the basis for a performance payout is the one assigned for the most recently completed appraisal period. Unless otherwise provided in this section, if an employee is not eligible to have a rating of record for the current rating cycle for reasons other than those identified in paragraphs (i) through (l) of this section, such employee will not be eligible for a performance payout under this part.

(b) *Performance pay pools.* (1) Pay pools and pay pool oversight will be established and managed in accordance with implementing issuances published by the Secretary, in such a manner as to ensure employees are treated fairly and consistently, and in accordance with merit system principles.

(2) Consistent with paragraph (b)(1) of this section, pay pool composition will be based on organization structure, classification structure, function of work, location, and/or organization mission. The decision on pay pool composition will be reviewed and approved by an official who is at a higher level than the official who made the initial decision, as determined by a Component, unless there is no official at a higher level in the organization.

(3) Where determined appropriate, management may establish one or more subsets of a pay pool population (*i.e.*, sub pay pools) for the purpose of reconciling ratings of record, share assignments, and payout determinations. Sub pay pools share in the common fund of the overall pay pool and operate within the requirements and guidelines established for the pay pool to which they belong.

(4) The Secretary may determine a percentage of pay to be included in pay pools and paid out, in accordance with accompanying implementing issuances, as—

- (i) A performance-based pay increase;
- (ii) A performance-based bonus; or
- (iii) A combination of a performance-based pay increase and a performance-based bonus.

(5) The decision to apply a funding floor or ceiling to a pay pool, including the amount of such floor or ceiling, will be reviewed and approved by an official who is at a higher level than the official who made the initial decision, as determined by a Component, unless there is no official at a higher level in the organization.

(c) *Pay Pool Panel.* (1) Consistent with this section, the Pay Pool Panel—

- (i) Reviews rating of record, share assignment, and payout distribution recommendations;
- (ii) Makes adjustments, which in the Panel's view would result in equity and consistency across the pay pool; and

(iii) Elevates any disagreement between the Pay Pool Panel and the employee's supervisory chain to the Pay Pool Manager as applicable, for resolution.

(2) The Pay Pool Panel members may not participate in payout deliberations or decisions that directly impact their own ratings of record or pay.

(d) *Pay Pool Manager.* The Pay Pool Manager—

(1) Provides oversight of the Pay Pool Panel;

(2) Consistent with this section, is the final approving authority for performance ratings; and

(3) May not participate in payout deliberations or decisions that directly impact his or her own rating of record or pay.

(e) *Performance Review Authority (PRA).* Consistent with this section, the PRA—

(1) Oversees the operation of pay pools established under NSPS;

(2) Ensures procedural and funding consistency among pay pools under NSPS; and

(3) May not participate in payout deliberations or decisions that directly impact his or her own rating of record or pay.

(f) *Performance shares.* (1) Performance shares will be used to determine performance pay increases and/or bonuses. The range of shares which may be assigned for each rating level is as follows:

PERFORMANCE SHARE RANGES TABLE

Rating of record	Share range available for assignment
Level 5	5 or 6 shares.
Level 4	3 or 4 shares.
Level 3	1 or 2 shares.
Level 2	No shares.
Level 1	No shares.

(2) The only factors that may be used in determining share assignment are complexity of the work, level of responsibility, compensation (*e.g.*, recent salary increases, current salary in relation to control points or pay band maximum, current salary in relation to labor market), overall contribution to the mission of the organization, organizational success, and raw performance scores. Pay Pool Managers and/or

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Pay Pool Panels will review share assignment recommendations to ensure that factors are applied consistently across the pay pool and in accordance with the merit system principles.

(g) *Performance payout.* (1) A performance share is expressed as a percentage of an employee's rate of base salary and is a common value throughout the pay pool. The percent value of a performance share is calculated by dividing the pay pool fund (expressed in dollars) by the summation of the products of multiplying each employee's base salary times the number of shares earned by the employee.

[Share Value(%) = Pay Pool Fund(\$)/
Σ(base salary of each pay pool member × shares assigned each pay pool member)]

(2) An employee's performance payout is calculated by multiplying the employee's base salary as of the end of the pay pool's appraisal period times the number of shares earned by the employee times the share value.

[Employee Performance Payout = Base Salary × Shares × Share Value]

(3) A performance payout may be an increase in base salary, a bonus, or a combination of the two. An increase in base salary may not cause the employee's rate of base salary to exceed the maximum rate or applicable control point of the employee's band rate range. The decision to pay a bonus, including the amount of such bonus, will be reviewed and approved by an official who is at a higher level than the official who made the initial decision, as determined by a Component, unless there is no official at a higher level in the organization.

(4) The factors management may consider in determining the amount to be paid out as a bonus versus an increase in the rate of base salary are limited to the following:

(i) Current base salary in relation to appropriate rate range;

(ii) Current base salary, level of responsibility and complexity of work performed in comparison with others in similar work assignments;

(iii) Performance-based compensation received during the rating cycle

associated with promotions, reassignments, or awards;

(iv) Salary levels of occupations in comparable labor markets;

(v) Attrition and retention rates of critical shortage skill personnel;

(vi) Expectation of continued performance at that level;

(vii) Overall contribution to the mission of the organization; and

(viii) Composition of the pay pool fund.

(5) When an employee's base salary is not increased because the employee's base salary has reached the maximum of the pay band or an applicable control point, any remaining performance payout will be paid as a bonus in lieu of the increase to base salary.

(6) The effective date of an increase in base salary made under this section will be the first day of the first pay period beginning on or after January 1 of each year.

(7) Unless otherwise specified in this section, employees who are no longer covered by NSPS on the effective date of the payout, or who moved out of NSPS on a permanent move after the end of their rating cycle but before the effective date of the payout, are not entitled to a performance-based payout.

(8) For employees receiving a retained rate above the applicable pay band maximum, the entire performance payout must be in the form of a bonus payment. Any performance payout in the form of a bonus for a retained rate employee will be computed based on the maximum rate of the assigned pay band.

(9)(i) NSPS employees shall be evaluated and assigned a rating of record by the appropriate official associated with the pay pool of record on the last day (normally September 30) of the appraisal period when the employee—

(A) Changes jobs within NSPS after the last day of the appraisal period and before the effective date of the payout;

(B) Is eligible for a rating of record; and

(C) Moves to a position that falls under the authority of a different NSPS pay pool.

(ii) For an employee covered by paragraph (g)(9)(i) of this section, the payout will be calculated and paid based

on the pay pool funding and share valuation of the gaining pay pool except when the employee transfers to an NSPS position that does not have a fully constituted pay pool in which case the payout is based on the share valuation of the losing pay pool. In all cases, the gaining pay pool will determine the share assignment and payout distribution between salary increase and bonus.

(10) To the extent permitted by law, NSPS organizations will share the results of the performance management process with NSPS employees. At a minimum, these pay pool results will include the following: Average rating, ratings distribution, share value (or average share value), and average payout (expressed as a percentage). Organizations will ensure that the sharing of these or any other pay pool results will be presented in a manner that does not violate the Privacy Act.

(h) *Proration of performance payouts.* The Secretary will issue implementing issuances regarding prorating of performance payouts for employees who, during the appraisal period, are—

(1) Hired, transferred, reassigned, or promoted into NSPS;

(2) In a leave-without-pay status (except as provided in paragraphs (i) and (j) of this section); or

(3) In other circumstances where prorating is considered appropriate.

(i) *Adjustments for employees returning after performing honorable service in the uniformed services*—(1) *General.* The rate of base salary for an employee who is absent from an NSPS position to perform service in the uniformed services (in accordance with 38 U.S.C. 4301 et seq. and 5 CFR 353.102) and who has the right to be reemployed or restored to duty by law, Executive order, or regulation under which accrual of service for seniority-related benefits is protected (e.g., 38 U.S.C. 4316) will be set in accordance with this paragraph (i) and supplementary instructions in applicable implementing issuances.

(2) *Periods for which employee is eligible for a rating of record.* When an employee is eligible for an NSPS rating of record for an appraisal period, the employee will be credited with base salary rate increases as provided under § 9901.323 and under this section based

on the employee's NSPS rating of record for that appraisal period. These rate adjustments are effective on the normal date for each adjustment (in accordance with §§ 9901.323 and 9901.342(g)(6)); however, if an employee is separated as opposed to in a leave status at the time of the adjustments, no adjustment will be processed until the employee is reemployed through the exercise of a reemployment right. An employee covered by this paragraph (i)(2) is eligible for a performance-based pay pool bonus if otherwise eligible by share assignment and payout distribution.

(3) *Periods for which employee is not eligible for a rating of record.* If an employee does not have an NSPS rating of record for the appraisal period serving as a basis for increases to base salary under this section, rate adjustments will be made based on the average base salary increase (expressed as a percentage) granted to other employees in the same pay pool who received the same rating as the employee's last NSPS rating of record or the average base salary increase (expressed as a percentage) granted to employees who received the modal rating for the pay pool, whichever is most advantageous to the employee. The employee will also be credited with base salary rate increases under § 9901.323 consistent with the provisions of that section. These rate adjustments are effective on the normal date for each adjustment in accordance with §§ 9901.323 and 9901.342(g)(6); however, if an employee is separated as opposed to in a leave status at the time of the adjustments, no adjustment will be processed until the employee is reemployed through the exercise of a reemployment right. The employee is not eligible for bonus payments for periods covered by this paragraph (i)(3), except as otherwise required by law.

(4) *Insufficient statistical information.* In cases where insufficient statistical information exists to determine the modal rating, the Secretary may establish alternative procedures for determining a base salary increase under this section.

(5) *Proration prohibited.* Proration of base salary rate adjustments is prohibited in the case of employees covered by this paragraph (i).

(j) *Adjustments for employees returning to duty after being in workers' compensation status—(1) General.* The rate of base salary for an employee who is absent from an NSPS position while receiving injury compensation under 5 U.S.C. chapter 81, subchapter I (in a leave-without-pay status or as a separated employee), and who has rights under 5 U.S.C. 8151 will be set in accordance with this paragraph (j) and applicable implementing issuances.

(2) *Periods for which employee is eligible for a rating of record.* When an employee is eligible for an NSPS rating of record for an appraisal period, the employee will be credited with base salary rate increases as provided under § 9901.323 and under this section based on the employee's NSPS rating of record for that appraisal period. These rate adjustments are effective on the normal date for each adjustment in accordance with §§ 9901.323 and 9901.342(g)(6); however, if an employee is separated at the time of the adjustments, no adjustment will be processed until the employee is reemployed. An employee covered by this paragraph (j)(2) is also eligible for a performance-based pay pool bonus if otherwise eligible by share assignment and payout distribution.

(3) *Periods for which employee is not eligible for a rating of record.* If an employee does not have an NSPS rating of record for the appraisal period serving as a basis for increases to base salary under this section, rate adjustments will be made based on the average base salary increase (expressed as a percentage) granted to other employees in the same pay pool who received the same rating as the employee's last NSPS rating of record or the average base salary increase (expressed as a percentage) granted to employees who received the modal rating for the pay pool, whichever is most advantageous to the employee. The employee will also be credited with base salary rate increases under § 9901.323 consistent with the provisions of that section. These rate adjustments are effective on the normal date for each adjustment in

accordance with §§ 9901.323 and 9901.342(g)(6); however, if an employee is separated as opposed to in a leave status at the time of the adjustments, no adjustment will be processed until the employee is reemployed. The employee is not eligible for bonus payments for periods covered by this paragraph (j)(3).

(4) *Insufficient statistical information.* In cases where insufficient statistical information exists to determine the modal rating, the Secretary may establish alternative procedures for determining a base salary increase under this section.

(5) *Proration prohibited.* Proration of base salary adjustments is prohibited in the case of employees covered by this paragraph (j).

(k) *Adjustments for employees in special circumstances—(1) General.* The Secretary will adjust the rate of base salary in accordance with the provisions in this paragraph for an NSPS employee who is in an NSPS covered position on the effective date of the payout and who is unable to meet the minimum performance period during the given appraisal period as a result of—

(i) Performing activities on "official time" (as defined in 5 U.S.C. 7131);

(ii) Serving on a long-term training assignment; or,

(iii) Approved paid leave.

(2) *Base salary increases.* If an employee does not have an NSPS rating of record for the appraisal period serving as a basis for increases to base salary under this section, such adjustments will be based on the average base salary increase (expressed as a percentage) granted to other employees in the same pay pool who received the same rating as the employee's last NSPS rating of record or the average base salary increase (expressed as a percentage) granted to employees who received the modal rating for the pay pool, whichever is most advantageous to the employee.

(3) *Insufficient statistical information.* In cases where insufficient statistical information exists to determine the modal rating, the Secretary may establish alternative procedures for determining a base salary increase under this section.

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(1) *Adjustments for employees returning from temporary assignments outside of NSPS for which no NSPS performance plan was assigned—(1) General.* The Secretary will set the rate of base salary prospectively for an employee who returns from a temporary assignment (including a supervisory probationary assignment) outside of NSPS for which no NSPS performance plan was assigned in accordance with this paragraph (1).

(2) *Periods for which employee is eligible for a rating of record.* When an employee is eligible for an NSPS rating of record for an appraisal period, the employee will be credited with base salary increases as provided under § 9901.323 and this section based on the employee's NSPS rating of record for that appraisal period. When an employee returns to an NSPS position, these adjustments will be processed in determining the employee's prospective base salary rate. An employee covered by this paragraph (1)(2) is also eligible for a performance-based pay pool bonus if otherwise eligible by share assignment and payout distribution.

(3) *Periods for which employee is not eligible for a rating of record.* If an employee does not have an NSPS rating of record for the appraisal period serving as a basis for increases to base salary under this section, the employee will be credited with base salary rate adjustments based on the average base salary increase (expressed as a percentage) granted to other employees in the same pay pool who received the same rating as the employee's last NSPS rating of record or the average base salary increase (expressed as a percentage) granted to employees who received the modal rating for the pay pool, whichever is most advantageous to the employee. The employee will also be credited with base salary rate increases under § 9901.323 consistent with the provisions of that section. The base salary rate adjustments under this paragraph (1)(3) will be used solely in determining the prospective NSPS base salary rate upon return to the NSPS position. The employee is not eligible for bonus payments for periods covered by this paragraph (1)(3).

(4) *Insufficient statistical information.* In cases where insufficient statistical

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information exists to determine the modal rating, the Secretary may establish alternative procedures for determining a base salary increase under this section.

§ 9901.343 Pay reduction based on unacceptable performance and/or conduct.

An employee's rate of base salary may be reduced based on a determination of unacceptable performance, conduct, or both after applying applicable adverse action procedures. Such a reduction will be at least 5 percent of base salary and may not exceed 10 percent of base salary. However, a reduction in base salary may be less than 5 percent to prevent the employee's base salary from falling below the minimum rate of the employee's pay band and may be more than 10 percent if a larger reduction is needed to place the employee at the maximum rate of the lower band. (See also §§ 9901.353(f) and 9901.355(b)(4).) An employee's rate of base salary may not be reduced more than once in a 12-month period based on unacceptable performance, conduct, or both.

§ 9901.344 Other performance payments.

(a) The decision to grant other performance payouts, including the amount of such payouts, will be reviewed and approved by an official of the employee's Component who is at a higher level than the official who made the initial decision, as determined by the Component, unless there is no official at a higher level in the organization. In accordance with implementing issuances, authorized officials may make other performance payments to—

(1) Reward extraordinary individual performance, as described in paragraph (b) of this section;

(2) Recognize organizational or team achievement, as described in paragraph (c) of this section; and

(3) Provide for other special circumstances.

(b)(1) Extraordinary Performance Recognition (EPR) is an increase to base salary, a bonus, or a combination of these intended to reward employees

when the payout formula does not adequately compensate them for their extraordinary performance and results. The EPR payment is in addition to performance payouts under § 9901.342 and will usually be made effective at the time of those payouts. When an EPR payout is made in the form of an increase to base salary, the future performance and contribution level exhibited by the employee will be expected to continue at an extraordinarily high level.

(2) Only employees who have achieved a Level 5 NSPS rating of record for the most recently completed appraisal period are eligible for an EPR.

(3) The amount of an EPR awarded in the form of an increase to base salary may not cause the employee's base salary to exceed the maximum rate of the employee's pay band or any applicable control point, unless the criteria for exceeding the control point are met.

(c)(1) Organizational/Team Achievement Recognition (OAR) payments may be made in the form of an increase to base salary, a bonus, or a combination of these in order to recognize the members of a team, organization or branch whose performance and contributions have successfully and directly advanced organizational goals. The OAR payment is made in conjunction with the annual performance payout.

(2) To receive an OAR, an employee must have an NSPS rating of record of Level 3 or higher for the most recently completed appraisal period.

(3) The amount of the OAR payment provided in the form of an increase to base salary may not cause the employee's base salary to exceed the maximum rate of the employee's pay band or any applicable control point, unless the criteria for exceeding the control point are met.

§ 9901.345 Accelerated Compensation for Developmental Positions (ACDP).

(a) Accelerated Compensation for Developmental Positions (ACDP) is an increase to base salary that may be provided to employees participating in Component training programs or in other developmental capacities as de-

termined by Component policy. ACDP recognizes growth and development in the acquisition of job-related competencies combined with successful performance of job objectives.

(b) The use of ACDP is limited to—

(1) Employees in the lowest pay band of a nonsupervisory pay schedule who are in developmental or trainee level positions; and

(2) Employees in positions which are assigned to a Student Career Experience Program and which are in a pay schedule established exclusively for students.

(c) Components choosing to provide ACDP increases must establish and document standards by which such employees will be identified and growth and development criteria by which additional pay increases will be determined.

(d) The amount of the ACDP increase generally will not exceed 20 percent of an employee's base salary. The decision to grant an ACDP exceeding 20 percent of an employee's base salary must be made on a case-by-case basis and approved by an official who is at a higher level than the official who made the initial decision, as determined by the Component, unless there is no official at a higher level in the organization.

(e) The amount of the ACDP increase may not cause the employee's base salary to exceed the top of the employee's pay band or any applicable control point, unless the criteria for exceeding the control point are met.

(f) To qualify for an ACDP, an employee must have a rating of record of Level 3 (or equivalent non-NSPS rating of record) or higher, consistent with § 9901.405. An ACDP may be awarded to an employee who does not have a rating of record if an authorizing official conducts a performance assessment and determines that the employee is performing at the equivalent of Level 3 or higher. This performance assessment does not constitute a rating of record.

(g) An ACDP increase may not be granted unless the employee is in a pay and duty status in an NSPS-covered position on the effective date of the increase.

(h) The Secretary may provide adjustments under this section in lieu of

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or in addition to adjustments under § 9901.342.

PAY ADMINISTRATION

§ 9901.351 General.

(a) *Introduction.* The pay administration provisions in §§ 9901.351 through 9901.356 are applied using base salary rates, except when specifically otherwise provided.

(b) *Geographic recalculation.* When an employee covered by a targeted local market supplement moves to a position in a new location where a different local market supplement and/or pay schedule applies, the employee's adjusted salary before the move will be recalculated to reflect a local market supplement (standard or targeted, as appropriate) for the employee's existing position—as if that position were at the same location as the position to which the employee is moving, consistent with the geographic conversion principle described at 5 CFR 531.205. For employees moving from a non-NSPS position to an NSPS position in a different location covered by a different salary supplement, the employee's adjusted salary under the former system will be recalculated as if the former position were located in the new location, consistent with the geographic conversion principle described at 5 CFR 531.205 or 5 CFR 536.303(b), as applicable.

(c) *Within-grade increase (WGI) adjustment equivalent.* (1) When an employee is permanently placed (not by conversion under § 9901.371 or by promotion under § 9901.354) in an NSPS position from a GS or FWS position through a management-directed action (except for actions taken for misconduct or unacceptable performance), including a management-directed reassignment or realignment, or any placement as a result of a reduction in force (RIF), or placement via the Priority Placement Program (PPP), Reemployment Priority List (RPL), or Interagency Career Transition Assistance Plan (ICTAP), the employee will receive an increase to base salary equivalent to the amount he or she would have received as a WGI adjustment if the employee had converted into NSPS with his or

her organization, as provided in § 9901.371.

(2) An employee who is placed in an NSPS position from a GS or FWS position through an employee-initiated reassignment may, at the discretion of the authorized management official, receive this same WGI adjustment equivalent increase described in paragraph (c)(1) of this section. The decision to grant this increase will be reviewed and approved by an official who is at a higher level than the official who made the initial decision, as determined by the Component. At a minimum, the higher-level approval level may be no lower than one level above the authorized management official who approved the reassignment unless there is no official at a higher level in the organization.

(3) An increase provided under paragraphs (c)(1) and (c)(2) of this section occurs before any other discretionary reassignment increases provided under NSPS, may not cause the employee's base salary to exceed the maximum rate of the assigned pay band, and is in addition to any other discretionary reassignment increase the employee may be eligible to receive.

(d) *Minimum rate.* Except in the case of an employee who does not receive a pay increase under § 9901.323 because of an unacceptable rating of record, an employee's base salary may not be less than the minimum rate of the employee's pay band.

(e) *Maximum rate.* Except as provided in § 9901.356, an employee's base salary may not exceed the maximum rate of the employee's band rate range.

(f) *Pay periods and hourly rates.* The establishment of pay periods and the computation of rates of pay will conform to 5 U.S.C. 5504 and 5505, as applicable. For employees covered by 5 U.S.C. 5504, annual rates of base salary will be converted to hourly rates of base salary in computing payments received by covered employees.

(g) *Rate comparisons upon movement to an NSPS position.* An employee who moves to an NSPS position from a non-NSPS position by management-directed action (excluding conversion under § 9901.371) will receive a rate of basic pay that is not less than the employee's rate of basic pay immediately

before movement (after making adjustments consistent with those made under § 9901.371(e) for employees who convert to NSPS). For this purpose and for the purpose of applying 5 U.S.C. chapter 75, subchapter II (dealing with adverse actions), at the point of movement into NSPS, an employee's rate of basic pay includes any applicable locality payment under 5 U.S.C. 5304, special rate supplement under 5 U.S.C. 5305, local market supplement under § 9901.332, or equivalent payment under other legal authority.

(h) *Adjustment of annual rates for employees leaving certain teaching positions.* When an individual leaves a teaching position as defined in 20 U.S.C. 901 and moves to a position covered by NSPS, the individual's existing annual base salary rate for the teaching position may be adjusted for the purpose of setting pay under NSPS. The adjustment will take into account the shorter work year applicable to the teacher position. The adjustment may not exceed 20 percent of the existing annual base salary rate of the teaching position.

§ 9901.352 Setting an employee's starting pay.

(a) Subject to the requirements of this section, the Secretary may set the starting base salary rate for individuals who are newly appointed or reappointed to the Federal service anywhere within the rate range of the assigned pay band (subject to any applicable control points). Pay will be set based upon the following considerations:

(1) Labor market considerations (*i.e.*, availability of candidates and labor market rates);

(2) Specialized skills, knowledge, and/or education possessed by the employee in relation to the requirements of the position;

(3) Critical mission or business requirement(s);

(4) Salaries of other employees in the organization performing similar work; and

(5) Current salary of the candidate.

(b) For the purposes of this section, "newly appointed" means those individuals who have not previously been employed in the Federal service—*i.e.*, this is their first Federal appointment. The

term "reappointed" means those individuals who have been previously employed in the Federal service and have been separated from the Federal service for at least 1 full workday immediately before employment in an NSPS position. The term "Federal service" includes civilian service as an employee of any entity of the Federal Government, including the judicial branch, legislative branch, and executive branch (including Government corporations, the Postal Regulatory Commission, the U.S. Postal Service and any nonappropriated fund (NAF) instrumentality described in 5 U.S.C. 2105(c)).

§ 9901.353 Setting pay upon reassignment.

(a)(1) A reassignment occurs when an employee moves, voluntarily or involuntarily, to a different position or set of duties within his/her pay band or to a position in a comparable pay band, or from a non-NSPS position to an NSPS position at a comparable level of work, on either a temporary or permanent basis. In NSPS, employees may be eligible for an increase or decrease to base salary upon temporary or permanent reassignment as described in this section.

(2) An employee who is reassigned through reduction-in-force (RIF) procedures is not eligible for an increase to base salary under this section (except as necessary to set the employee's rate at the band minimum), but is eligible for an increase under § 9901.351(c)(1). An employee's base salary will be protected by applying pay retention under § 9901.356, if applicable.

(3) A decision to increase an employee's pay under this section will be based on one or more of the following factors:

(i) A determination that an employee's responsibilities will significantly increase;

(ii) Critical mission or business requirements;

(iii) Need to advance multi-functional competencies;

(iv) Labor market conditions (*i.e.*, availability of candidates and labor market rates);

(v) Reassignment from non-supervisory to supervisory position;

(vi) Employee's past and anticipated performance and contribution;

(vii) Location of position;

(viii) Specialized skills, knowledge, or education possessed by the employee in relation to those required by the position; and

(ix) Salaries of other employees in the organization performing similar work.

(b)(1) Except as otherwise provided in paragraph (c) of this section, when an employee is voluntarily reassigned within his/her pay band or to a comparable pay band, an authorized management official may reduce the employee's base salary in any amount determined prior to the reassignment with the employee's agreement, as long as the employee's base salary does not drop below the minimum of the assigned rate range. In appropriate circumstances, an authorized management official may make approval of a reassignment contingent on the employee's acceptance of a reduced rate. Subject to paragraph (b)(2) of this section, an authorized management official may also increase the employee's current base salary by up to 5 percent (not to exceed the rate range maximum).

(2) The decision to grant a decrease or increase, including the amount of such decrease or increase, as applicable under paragraph (b)(1) of this section, will be reviewed and approved by an official who is at a higher level than the official who made the initial decision, as determined by the Component. At a minimum, the higher-level approval may be no lower than one level above the authorized management official who approved the reassignment unless there is no official at the higher level in the organization. There are no limits to the number of times an employee may be reassigned; however, an employee may only receive up to a total of a 5 percent cumulative increase to base salary in any 12-month period as the result of an employee-initiated action, unless an exception to the 12-month limitation is approved by an authorized management official. The increase will be calculated as a percentage of the employee's base salary at the time the increase takes effect.

(c)(1) Subject to paragraphs (b)(2) and (c)(2) through (c)(5) of this section, as applicable, when an employee is voluntarily reassigned from a position with a targeted local market supplement or from a non-NSPS position (e.g., General Schedule, Federal Wage System, Nonappropriated Fund), an authorized management official will set pay considering the employee's adjusted salary (including any applicable locality pay, special rate supplement, or other equivalent supplement) and any physicians' comparability allowance payable for the position held prior to the reassignment.

(2) An authorized management official may—

(i) Set the employee's new adjusted salary equal to the employee's current adjusted salary plus any physicians' comparability allowance, if applicable, received prior to the reassignment;

(ii) Decrease the employee's adjusted salary by any amount determined prior to the reassignment with the employee's agreement, as long as the employee's base salary does not drop below the minimum of the assigned rate range; or

(iii) Increase the employee's current adjusted salary plus any physicians' comparability allowance, if applicable, by up to 5 percent (subject to the limitation that the resulting base salary may not exceed the rate range maximum).

(3) After setting the employee's NSPS adjusted salary, the adjusted salary will be apportioned between the employee's base salary and the appropriate local market supplement or targeted local market supplement.

(4) If the NSPS adjusted salary is increased beyond the amount of the employee's current adjusted salary plus any physicians' comparability allowance, the percentage of the increase is counted toward the 12-month limitation under paragraph (b) of this section.

(5) When an employee covered by paragraph (c)(1) of this section moves geographically in conjunction with a voluntary reassignment, the employee's current adjusted salary must be recalculated in accordance with the rules at § 9901.351(b) before setting pay under paragraph (c)(2) of this section.

(d)(1) Except as otherwise provided in paragraphs (e) or (f) of this section, when an employee is reassigned via management-directed action within his/her current pay band or to a comparable pay band, an authorized management official will set pay at an amount no less than the employee's current base salary and may increase the employee's current base salary by up to 5 percent. (If the employee's current base salary exceeds the maximum of the new pay band, no increase is provided, and the employee's rate will be set at that maximum rate, or if the employee is eligible, converted to a retained rate as provided in § 9901.356.)

(2) The decision to grant an increase under paragraph (d)(1) of this section, including the amount of such increase, is discretionary and will be reviewed and approved by an official who is at a higher level than the official who made the initial decision, as determined by a Component, unless there is no official at a higher level in the organization. There is no limit to the number of times an employee may be reassigned by management, and the employee is eligible for an increase of up to 5 percent with each reassignment. Any increase associated with a management-directed reassignment does not count toward the 12-month limitation described in paragraph (b) of this section.

(e)(1) Subject to paragraphs (d)(2), (e)(2), (e)(3), and (f) of this section, as applicable, when an employee is reassigned via management-directed action from a position with a targeted local market supplement or from a non-NSPS position (e.g., General Schedule, Federal Wage System, Non-appropriated Fund), an authorized management official will set the employee's new adjusted salary at no less than the employee's adjusted salary (including any applicable locality pay, special rate supplement, or equivalent supplement) plus any physicians' comparability allowance payable for the position held prior to the reassignment, provided the resulting base salary does not exceed the maximum rate of the new pay band. Subject to the same maximum limitation, an authorized management official may also increase the employee's adjusted salary by up to 5 percent.

(2) After setting the employee's NSPS adjusted salary, the adjusted salary will be apportioned between the employee's base salary and the appropriate local market supplement or targeted local market supplement.

(3) When an employee covered by paragraph (e)(1) of this section moves geographically in conjunction with a management-directed reassignment, the employee's current adjusted salary must be recalculated in accordance with the rules in § 9901.351(b) before setting pay under such paragraph (e)(1).

(4) For the purpose of determining whether an employee experienced a reduction in pay under 5 U.S.C. chapter 75 when reassigned from a non-NSPS position under paragraph (e)(1) of this section, § 9901.351(g) applies.

(f) When an employee is involuntarily reduced in pay via reassignment to a comparable pay band through adverse action procedures (as a result of unacceptable performance and/or conduct), the pay reduction must be at least 5 percent, but no more than 10 percent, of an employee's base salary. However, a reduction may be less than 5 percent to prevent the employee's base salary from falling below the minimum rate of the employee's pay band and may be more than 10 percent if a larger reduction is needed to place the employee at the maximum rate of the lower band. An employee's base salary may not be reduced more than once in a 12-month period based on unacceptable performance, conduct, or both. (See also § 9901.343.)

(g) When an employee returns to an NSPS position from a temporary reassignment to another NSPS position, the employee's current base salary rate must be reconstructed as if the employee had not been temporarily reassigned. For this purpose, the employee will be deemed to have received performance pay increases under § 9901.342 and other increases in base salary under §§ 9901.344 and 9901.345 equal to the percentage value of such increases actually received by the employee during the temporary reassignment. However, any such increases must be applied as if the employee were in the position and band held immediately before the temporary reassignment (*i.e.*, using the rate range and any applicable

control points for that band). The employee will also be credited with any general salary increases provided during the temporary reassignment that would have been applied to the employee if he or she had continued to hold the position held immediately before that temporary reassignment. A reassignment increase is not authorized when the employee returns to the position from which temporarily reassigned. (See § 9901.342(1) for rules governing pay setting for an employee who returns to an NSPS position after being temporarily assigned to a non-NSPS position.)

(h) If an employee's temporary reassignment is made permanent, the permanent reassignment is treated as a new reassignment for purposes of applying this section.

(i) When an employee is reassigned to an NSPS supervisory position but later returns to the NSPS position held before that reassignment (or comparable position) because of failure to complete a supervisory probationary period, the employee's base salary rate must be reconstructed as if the employee had not been reassigned. For this purpose, the employee will be deemed to have received performance pay increases under § 9901.342 and other increases in base salary under §§ 9901.344 and 9901.345 equal to the percentage value of such increases actually received by the employee during the reassignment. However, any such increases must be applied as if the employee were in the position and band held immediately before the reassignment (*i.e.*, using the rate range and any applicable control points for that band). The employee will also be credited with any general salary increases provided during the reassignment that would have been applied to the employee if he or she had continued to hold the position held immediately before that reassignment. A reassignment increase upon return to the previous position (or comparable position) under this paragraph is not authorized. (See § 9901.342(1) for rules governing pay setting for an employee who returns to an NSPS position after failure to complete a supervisory probationary period for a non-NSPS supervisory position.)

§ 9901.354 Setting pay upon promotion.

(a)(1) Except as otherwise provided in this section, upon an employee's promotion, the employee will receive an increase in his or her base salary equal to at least 6 percent, but the resulting base salary rate may not be lower than the minimum rate or higher than the maximum rate of the new pay band. The decision to grant a promotion increase exceeding 12 percent must be reviewed and approved by an official who is at a higher level than the official who made the initial decision, as determined by the Component, unless a higher increase is necessary to reach the minimum rate of the new pay band or there is no official at a higher level in the organization.

(2) When an employee from a non-NSPS position is promoted to an NSPS position, the authorized management official shall first apply § 9901.353(e)(1) through (e)(3) to determine the employee's adjusted salary rate as if reassigned without a discretionary increase or decrease in pay. After apportioning the employee's adjusted salary between base salary and local market supplement or targeted local market supplement, the authorized management official will then increase the employee's salary rate as provided in § 9901.354(a)(1).

(b) The authorized management official may consider only the following criteria in determining the amount of the promotion increase:

(1) Critical mission or business requirements;

(2) Employee's past and anticipated performance and contribution;

(3) Specialized skills or knowledge possessed by the employee;

(4) Labor market conditions (including availability of candidates and the labor market rates for similar types of employees at the level represented by the pay band to which the employee is being promoted);

(5) Base salary rates paid to other employees in similar positions in the higher pay band; and

(6) Location of position.

(c)(1) If an employee's temporary promotion is made permanent without a break, the employee's base salary will remain unchanged. No additional promotion increase may be provided.

(2) When an employee returns from a temporary promotion to another NSPS position, the employee's current base salary rate must be reconstructed as if the employee had not been temporarily promoted. For this purpose, the employee will be deemed to have received performance pay increases under § 9901.342 and other increases in base salary under §§ 9901.344 and 9901.345 equal to the percentage value of such increases actually received by the employee during the temporary promotion. However, any such increases must be applied as if the employee were in the position and band held immediately before the temporary promotion (*i.e.*, using the rate range and any applicable control points for that band). The employee will also be credited with any general salary increases provided during the temporary promotion that would have been applied to the employee if he or she had continued to hold the position held immediately before that temporary promotion. A reduction-in-band increase upon return to the previous position (or comparable position) under this paragraph is not authorized. (See § 9901.342(1) for rules governing pay setting for an employee who returns to an NSPS position after being temporarily assigned to a non-NSPS position.)

(d)(1) An employee on pay retention who is re-promoted to the pay band from which reduced (or a comparable band) is not automatically entitled to have his/her pay set in accordance with the promotion rules described in paragraphs (a) and (b) of this section. If the employee's retained rate falls within the rate range of the newly assigned pay band, the authorized management official may maintain the same base salary upon re-promotion, or increase the employee's base salary to a rate above his or her retained rate. However, the employee's new base salary may not exceed the rate that would be provided using the promotion rules described in paragraphs (a) and (b) of this section. The employee's retained rate will be used when calculating any increase approved by an authorized management official. If the employee's retained rate falls below the minimum rate of the newly assigned pay band, the employee's base salary must be set

at least at the minimum rate of the band. If the employee's retained rate is higher than the maximum rate of the newly assigned pay band, pay retention will continue (subject to the requirements of § 9901.356).

(2) An employee who is promoted to a pay band higher than the one from which previously reduced in band will be covered by the promotion rules described in paragraphs (a) and (b) of this section. The employee's retained rate will be used when calculating the 6 percent (or higher) increase.

§ 9901.355 Setting pay upon reduction in band.

(a) *General.* When an employee is reduced in band, either voluntarily or involuntarily, the setting of the employee's base salary rate is subject to the rules in this section. As applicable, pay retention provisions established under § 9901.356 will apply. If pay retention does not apply, the employee's base salary may be reduced, subject to the requirements in paragraph (b) of this section. The employee may be eligible for an increase to base salary, subject to the requirements in paragraph (c) of this section.

(b) *Pay reduction.* An employee's base salary may be reduced upon reduction in band, subject to the following requirements:

(1) No base salary reduction is made when pay retention is applicable, except under paragraph (b)(4) of this section.

(2) The reduction in base salary may not cause the rate to fall below the minimum rate of the employee's new band.

(3) The base salary must be reduced as necessary to ensure that the new base salary is no greater than the maximum rate of the employee's new band.

(4) Adverse action procedures in 5 U.S.C. chapter 75 must be applied when an employee is involuntarily placed in a position in a lower pay band for unacceptable performance and/or conduct. In this circumstance, the authorized management official may reduce the employee's base salary. If such a reduction is made, it must be at least 5 percent, but no more than 10 percent, of

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an employee's base salary after applying adverse action procedures. However, a reduction in base salary under this paragraph may be less than 5 percent to prevent the employee's base salary from falling below the minimum rate of the employee's new pay band and may be more than 10 percent if a larger reduction is needed to place the employee at the maximum rate of the lower band. (See also § 9901.343.)

(5) If an employee held a position with a targeted local market supplement or a non-NSPS position prior to the reduction in band, the pay reduction is applied using adjusted salary rates, consistent with the reassignment rules in § 9901.353(c) (including, as appropriate, a geographic recalculation prior to applying the decrease, consistent with the provisions of § 9901.351(b)).

(c) *Pay increase.* An employee's base salary may be increased by an authorized management official upon reduction in band, subject to the following requirements:

(1) An employee who is reduced in band involuntarily—e.g., through reduction-in-force (RIF) procedures or by placement through the DoD Priority Placement Program (PPP) or Reemployment Priority List (RPL)—is not eligible for an increase to base salary (except if necessary to set the employee's base salary at the minimum rate of the new pay band).

(2) When an employee voluntarily moves to a lower pay band, the authorized management official may increase the employee's base salary, but must set the employee's base salary within the rate range for the employee's band. An increase in base salary may be up to 5 percent of the employee's current base salary (not to exceed the maximum of the rate range). This increase of up to 5 percent is deemed to be a "reassignment increase" for the purpose of applying the 12-month limitation in § 9901.353(b)(2). Also, in applying this increase, adjusted salary rates will be used when an employee held a position with a targeted local market supplement or a non-NSPS position prior to the reduction in band, consistent with the reassignment increase rules in § 9901.353(c) (including, as appropriate, a geographic recalculation prior to ap-

plying the increase, consistent with the provisions of § 9901.351(b)). This increase is subject to higher-level approval. At a minimum, the higher-level approval may be no lower than one level above the authorized management official who approved the reduction in band, unless there is no higher-level management official.

(3) After setting the employee's NSPS adjusted salary, the adjusted salary will be apportioned between the employee's base salary and the appropriate local market supplement or targeted local market supplement.

(4) A decision to increase an employee's pay under paragraph (c)(2) of this section will be based on—

(i) Critical mission or business requirements;

(ii) The need to advance multi-functional competencies;

(iii) The labor market conditions (i.e., availability of candidates, labor market rates for similar types of employees);

(iv) Reassignment from non-supervisory to supervisory position;

(v) Location of position;

(vi) Required specialized skills, knowledge, or education possessed by the employee;

(vii) Performance-based considerations; and

(viii) The base salary rates paid to other employees in similar positions in the lower pay band.

(d) *Termination of temporary promotion.* This section does not apply to a reduction in band associated with the termination of a temporary promotion. Instead, the rules in § 9901.354(c)(2) apply.

(e) *Failure to complete probationary period.* When an employee who fails to complete a supervisory probationary period is reduced in band upon return to the position held before the probationary period (or a comparable position), the employee's current base salary rate must be reconstructed as if the employee had not been promoted. For this purpose, the employee will be deemed to have received performance pay increases under § 9901.342 and other increases in base salary under §§ 9901.344 and 9901.345 equal to the percentage value of such increases actually received by the employee during

the promotion. However, any such increases must be applied as if the employee were in the position and band held immediately before the promotion (*i.e.*, using the rate range and any applicable control points for that band). The employee will also be credited with any general salary increases provided during the promotion that would have been applied to the employee if he or she had remained in the position held immediately before that promotion. A reduction-in-band increase upon return to the previous position (or comparable position) under this paragraph is not authorized. (See § 9901.342(1) for rules governing pay setting for an employee who returns to an NSPS position after being temporarily assigned to a non-NSPS position.)

§ 9901.356 Pay retention.

(a) Pay retention prevents a reduction in base salary that would otherwise occur by preserving the former rate of base salary within the employee's new pay band or by establishing a retained rate that exceeds the maximum rate of the new pay band. Local market supplements are not considered part of base salary in applying pay retention.

(b) Pay retention will be based on the employee's rate of base salary in effect immediately before the action that would otherwise reduce the employee's rate. A retained rate will be compared to the range of rates of base salary applicable to the employee's position.

(c) Pay retention will be granted for a period of 104 weeks. The Secretary may issue implementing issuances describing exceptions to the 104-week retention limit.

(d) Under NSPS, pay retention will be granted when an employee's base salary would otherwise be reduced in the following situations:

(1) As the result of reduction in force or reclassification;

(2) When an otherwise eligible employee is placed through the Priority Placement Program (PPP), including placement resulting from early registration, even though the employee does not have a specific reduction in force (RIF) notice;

(3) When an organization undergoes realignment or reduction, and

(i) An employee who would not be affected personally requests a reduction in band;

(ii) Management determines the employee's reduction in band results in placement in a more suitable position; and

(iii) That action lessens or avoids the impact of the RIF on other employees;

(4) When an employee accepts a position in a lower pay band designated in advance by the component as being hard-to-fill using any of the following criteria:

(i) Rates of pay offered by non-Federal employers are significantly higher than those payable under NSPS for the area, location, occupational group, or other class of positions involved;

(ii) The remoteness of the area or location involved;

(iii) The undesirability of the working conditions or the nature of the work involved (including exposure to toxic substances or other occupational hazards); or

(iv) Any other circumstances the Component considers appropriate, subject to review and approval by an official who is at a higher level than the official who made the initial decision;

(5) When an employee is reduced in band on return from an overseas assignment under the terms of a pre-established agreement including—

(i) An employee released from a period of service specified in his or her current transportation agreement due to an involuntary, management-initiated action other than for unacceptable performance and/or misconduct;

(ii) An employee, who has completed more than one year of service under a current agreement, released from a transportation agreement for compelling humanitarian or compassionate reasons; and

(iii) A non-displaced overseas employee under no obligation to return to the United States who is otherwise eligible for PPP registration in accordance with DoD Instruction 1400.20;

(6) When an employee declines an offer to transfer with his or her function to a location outside the commuting area, or is identified with such function but does not receive an offer at the gaining activity, and is placed in a position in a lower pay band at the

losing activity or any other DoD activity;

(7) When an employee accepts a position in a lower pay band offered by an activity to accommodate a disabling medical condition similar to the circumstances described in 5 CFR 831.1203(a)(4);

(8) When an employee occupying a position under a Schedule C appointment (authorized under 5 CFR 213.3301) is placed, other than for unacceptable performance and/or misconduct or at the employee's request, in a position in a lower pay band in the competitive service or in another Schedule C position, provided that such action is not solely the result of a change in agency leadership (change in administration);

(9) When an employee occupying an Army or Air Force dual status military technician position lost, or is scheduled to lose, eligibility for dual status technician employment through no fault of his or her own and accepts placement without a break in service to a non-dual status technician position in a lower pay band;

(10) When an employee occupying a National Guard dual status technician position is involuntarily separated, through no fault of his or her own, and accepts placement, without a break in service, to a non-dual or dual status technician position in a lower pay band or a competitive service NSPS position in a lower pay band;

(11) When an employee whose job is abolished declines an offer within the competitive area, but outside the commuting area, and is placed in a lower pay band position in the commuting area, provided the employee is not serving under a mobility agreement;

(12) When an employee's base salary is reduced as the result of the movement of his or her position from a DoD nonappropriated fund (NAF) instrumentality to coverage by the DoD civil service system without a break in service of more than three days; or

(13) When an employee's base salary would exceed the maximum of the rate range because the maximum of the rate range decreased or as a result of a management-directed reassignment.

(e) An authorized management official may grant pay retention for circumstances other than those detailed

in paragraphs (d)(1) through (d)(13) of this section. This determination is discretionary, and appropriate use is subject to higher-level approval. At a minimum, the higher-level approval may be no lower than one level above the authorized management official who recommended the determination. These circumstances may be specified in advance or may be approved on a case-by-case basis. This authority applies to personnel actions initiated by management, not at the employee's request, and other than for unacceptable performance and/or misconduct, and only if those actions would further the agency's mission in accordance with applicable law and regulation.

(f) Pay retention under this authority will terminate—

(1) At the end of the 104-week period (except as otherwise provided under paragraphs (c) and (m) of this section);

(2) When the employee moves to another position with a rate range that encompasses the employee's retained rate;

(3) When an increase in the maximum rate for the employee's pay band causes the maximum rate to equal or exceed his/her retained rate, or the employee's base salary is encompassed within his or her assigned rate range as a result of a pay reduction based on unacceptable performance and/or conduct, subject to adverse action procedures;

(4) When the employee is no longer covered by an NSPS position or has a break in service of 1 workday or more (which includes employees placed via PPP after separation), unless otherwise covered under another section of this regulation;

(5) When the employee is reduced in band for unacceptable performance and/or conduct; or

(6) When the employee is reduced in band at his or her request in circumstances other than stated in paragraph (d) of this section.

(g) An employee whose pay retention terminates at the end of the 104-week period will have his or her pay set at the maximum rate of the pay band in which he/she is currently assigned.

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(h) Upon termination of pay retention, the employee immediately becomes eligible for any applicable general salary increase and performance payout which may include an increase to base salary, unless otherwise ineligible.

(i) Pay retention does not apply in the following circumstances:

(1) Declination of a position offer under RIF procedures set forth in 5 CFR part 351;

(2) Break in service of 1 workday or more (which includes employees placed via PPP after separation), unless otherwise covered under paragraph (d) of this section;

(3) Movement from a non-DoD position to an NSPS-covered position;

(4) Failure to satisfactorily complete a supervisory probationary period;

(5) Return to an employee's former position at the end of a temporary promotion or temporary reassignment;

(6) Reassignment or reduction in band for unacceptable performance and/or conduct; or

(7) Reassignment or reduction in band at the employee's request in circumstances other than stated in paragraph (d) of this section.

(j) Employees entitled to a retained rate will receive any performance payouts in the form of bonuses, rather than base salary adjustments, as provided in §9901.342(g)(8).

(k) An employee receiving a retained rate will receive any general salary increase under §9901.323(a)(1), subject to the conditions in §9901.323, and will receive any applicable local market supplement adjustment, subject to the conditions in §9901.334.

(l) The 104-week time limit established under paragraphs (c) and (f)(1) of this section will be extended by a period of time equal to the length of time an employee is deployed away from his or her regular duty station in support of a contingency operation as defined in 10 U.S.C. 101, or an emergency as determined in accordance with DoD Directive 1400.31, "DoD Civilian Work Force Contingency and Emergency Planning and Execution" (or any successor regulation).

(m) Any employee with a preexisting entitlement to pay retention under 5 CFR part 536 immediately before be-

coming covered by NSPS through a management-directed action, or who obtains entitlement to pay retention upon becoming covered by NSPS through a management-directed action, will be entitled to a retained rate under this section without regard to the 104-week limit (as described in paragraphs (c) and (f)(1) of this section). Pay retention will terminate under the conditions in paragraphs (f)(2) through (f)(6) of this section.

PREMIUM PAY

§9901.361 General provisions.

(a) *Introduction.* As provided in §9901.303(a)(2), the provisions of 5 U.S.C. chapter 55, subchapter V, and related regulations are waived or modified as provided in paragraph (e) of this section and §§9901.362 through 9901.364 (except as provided in paragraph (b) of this section). To the extent that the provisions of 5 U.S.C. chapter 55, subchapter V, and related regulations are not waived or modified, NSPS employees and positions remain subject to those provisions. Sections 9901.363 and 9901.364 establish new types of premium payments in addition to those found in 5 U.S.C. chapter 55, subchapter V.

(b) *Provisions not waived or modified.* The following provisions of 5 U.S.C. chapter 55, subchapter V, are not waived or modified:

(1) 5 U.S.C. 5544 (relating to prevailing rate employees); and

(2) 5 U.S.C. 5545b (relating to firefighter pay).

(c) *Applicability of Fair Labor Standards Act.* The Fair Labor Standards Act of 1938 (FLSA), as amended (29 U.S.C. 201 et seq.) and OPM regulations in 5 CFR part 551 apply to NSPS employees. DoD must determine whether an employee is exempt or nonexempt under the FLSA minimum wage and overtime pay provisions in accordance with the FLSA and OPM regulations. In applying FLSA overtime pay provisions, local market supplements are treated the same as locality pay under 5 U.S.C. 5304 and are included in computing total remuneration, the hourly regular rate, and straight time rate under 5 CFR part 551.

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(d) *Applying regulations in 5 CFR part 550, subpart M.* In applying the regulations in 5 CFR part 550, subpart M (dealing with firefighter pay) to NSPS employees, the reference to “locality pay” in 5 CFR 550.1305(e) must be interpreted to be a reference to a local market supplement. Consistent with 5 CFR 550.1306(a), a firefighter compensated under 5 CFR part 550, subpart M, may not receive additional premium pay except for compensatory time off for travel under § 9901.362(j) or for religious observances under § 9901.362(k) and foreign language proficiency pay under § 9901.364.

(e) *Physicians and dentists.* Physicians and dentists (in occupational series 0602 and 0680, respectively) under NSPS are not eligible for premium pay except for compensatory time off for religious observances under § 9901.362(k).

(f) *Senior Executive Service.* Members of the Senior Executive Service under NSPS are not eligible for premium pay, except for compensatory time off for religious observances under § 9901.362(k).

§ 9901.362 Modification of standard provisions.

(a) *Premium pay limitations.* (1) An employee is covered by the premium pay limitations established under 5 U.S.C. 5547 and related regulations, except as provided in paragraph (a)(2) of this section. Notwithstanding the modification of various premium payments under this section, those payments are still considered to be payments in 5 U.S.C. chapter 55, subchapter V, for the purpose of applying 5 U.S.C. 5547 (including the purpose of determining the covered premium payments under 5 U.S.C. 5547(a)).

(2) Subject to § 9901.105, the Secretary may waive the limitations established by 5 U.S.C. 5547 and related regulations and instead apply an annual limitation equal to the rate payable under 3 U.S.C. 104 in the case of specified categories of employees and situations on a time-limited basis. Such a waiver may not apply with respect to additional compensation that is normally creditable as basic pay for retirement or any other purpose.

(b) *Overtime pay.* (1) An employee is covered by the overtime pay (including

compensatory time off) provisions in 5 U.S.C. 5542 and 5543 and related regulations, subject to the requirements and modifications described in paragraphs (b)(2) through (b)(6) of this section.

(2) Consistent with 5 U.S.C. 5542(c), an employee who is subject to section 7 of the Fair Labor Standards Act of 1938 (FLSA), as amended, is covered by OPM’s FLSA overtime regulations in 5 CFR part 551.

(3) Compensation for irregular or overtime work performed by National Guard Technicians is governed by 32 U.S.C. 709(h) and policies issued by the National Guard Bureau.

(4) Firefighters covered by 5 U.S.C. 5545b are subject to special overtime pay rules as described in that section and in 5 U.S.C. 5542(f) and in related regulations. (See also § 9901.361(d).)

(5) Compensatory time off earned under 5 U.S.C. 5543 must be used by the end of the 26th pay period after that in which it was earned. Compensatory time off not used within 26 pay periods will be paid at the overtime rate at which it was earned. Employees with unused compensatory time earned before June 8, 1997 (January 5, 1997, for Defense Logistics Agency employees), have had a separate “old compensatory time” account established for their use. Old compensatory time is charged only if the employee has insufficient current compensatory time (earned on or after June 8, 1997) to cover the compensatory time off requested. Within each category of compensatory time, the oldest will be charged first. When a DoD employee separates, moves to another Component, or transfers to another Federal agency, any unused compensatory time off balance will be paid at the overtime rate at which it was earned. Also, when an employee moves to a pay system that does not provide for compensatory time off (e.g., Senior Executive Service), any unused compensatory time off balance will be paid at the overtime rate at which it was earned.

(6) The following modifications to 5 U.S.C. 5542 and 5543 and related regulations apply:

(i) The overtime hourly rate cap for FLSA-exempt employees based on the rate of basic pay for the minimum rate for GS-10 does not apply; instead, an

FLSA-exempt employee is entitled to an overtime hourly rate equal to 1.5 times the employee's adjusted salary hourly rate unless the employee is in a pay band for which the overtime hourly rate is set equal to the employee's adjusted salary hourly rate based on a determination by the Secretary, subject to § 9901.105;

(ii) An FLSA-exempt employee will be compensated for overtime work (whether regular or irregular or occasional) using a quarter of an hour as the smallest fraction of an hour, with minutes rounded to the nearest full fraction of an hour;

(iii) An FLSA-exempt employee may not be credited with overtime hours of work for travel time unless that travel involves the performance of actual work while traveling; instead, any such noncreditable travel hours may be credited as earned compensatory time off for travel, subject to the requirements in paragraph (j) of this section; and

(iv) An FLSA-exempt employee may be required to receive compensatory time off under 5 U.S.C. 5543 in lieu of overtime pay, regardless of the type of overtime work or the amount of the employee's adjusted salary rate.

(c) *Night pay.* An employee is covered by the night pay provisions in 5 U.S.C. 5545(a) and (b) and related regulations, except for the following modifications:

(1) Night pay is payable for irregular or occasional overtime work in the same manner it is payable for regularly scheduled work; and

(2) Night pay is not payable during paid absences, except for a period of court leave, military leave, time off awarded under 5 U.S.C. 4502(e), or compensatory time off during religious observances, or when excused from duty on a holiday.

(d) *Sunday pay.* An employee is covered by the Sunday pay provisions in 5 U.S.C. 5546 and related regulations, except for the following modifications:

(1) Work for which Sunday pay is payable (*i.e.*, Sunday work) is limited to applicable hours of work that are actually performed on Sunday (*i.e.*, the definition of "Sunday work" in 5 CFR 550.103 applies except that non-Sunday hours are excluded even if those hours

are within a daily tour of duty that includes Sunday hours); and

(2) Consistent with section 624 of the Treasury and General Government Appropriations Act, 1999 (as found in section 101(h) of Division A of Public Law 105-277, October 21, 1998), Sunday pay is not payable unless an employee actually performed work during the time corresponding to such pay (*i.e.*, no Sunday pay for periods of paid leave, compensatory time off, credit hours, paid excused absence, or other paid time off).

(e) *Pay for holiday work.* An employee is covered by the holiday premium pay provisions in 5 U.S.C. 5546 and related regulations, except for the following modifications:

(1) Holiday premium pay is paid at twice an employee's adjusted salary hourly rate for each hour (including overtime hours) an employee is ordered or approved to work on a holiday;

(2) For FLSA-exempt employees, the payment for overtime hours worked on a holiday has two components: Payment required under paragraph (b) of this section for overtime worked, and an additional amount under this paragraph (e) such that the total payment for each hour is twice the employee's adjusted salary hourly rate; and

(3) For FLSA-nonexempt employees, the payment for overtime hours worked on a holiday has two components: Payment required under 5 CFR 551.512 for overtime worked, and an additional amount under this paragraph (e) such that the total payment for each hour is twice the employee's adjusted salary hourly rate.

(f) *Standby duty pay.* (1) An employee is covered by the standby duty pay provisions in 5 U.S.C. 5545 (c)(1) and related regulations, subject to the requirements and modifications in paragraphs (f)(2) through (f)(6) of this section.

(2) Except as provided in paragraph (f)(3), eligibility for regularly scheduled standby duty is limited to firefighters classified to the 0081 occupation who are not eligible for coverage under 5 U.S.C. 5545b, and to emergency medical technicians not involved in fire protection activities who are required to perform standby duty.

(3) The Secretary may approve extending standby duty premium pay coverage to occupations other than those cited in paragraph (f)(2) of this section. Component proposals to extend coverage will explain why employees within the specified occupational group must regularly remain at the duty station longer than ordinary periods of duty, a substantial part of which involves remaining in a standby status rather than performing actual work, and must address how the criteria in 5 CFR 550.143 are met.

(4) The standby percentage is always multiplied by an employee's adjusted salary rate regardless of the amount.

(5) Standby pay attributable to use of an adjusted salary rate exceeding the applicable GS–10, step 1, rate limitation is not considered to be paid under 5 U.S.C. 5545(c)(1) and thus is not creditable basic pay for retirement purposes.

(6) No additional premium pay for hours of overtime work (whether regularly scheduled or irregular or occasional), including compensatory time off, is payable to an employee receiving standby duty pay.

(g) *Administratively uncontrollable overtime pay.* The administratively uncontrollable overtime pay provision in 5 U.S.C. 5545(c)(2) is waived and will not be applied to NSPS employees. Compensation for such work will be made under the applicable provisions of this section.

(h) *Law enforcement availability pay.* An employee is covered by the law enforcement availability pay provisions in 5 U.S.C. 5545a and related regulations, except that the reference to “premium pay” in 5 CFR 550.186 will be interpreted to refer to the applicable title 5 premium payments and to the corresponding modified provisions in this section. In addition, the reference to “limitation on premium pay” in 5 CFR 550.185(a)(2) will be construed to refer to the limitations under 5 U.S.C. 5547 and to the corresponding modified provision in paragraph (a) of this section.

(i) *Pay for duty involving physical hardship or hazard.* (1) An employee is covered by the hazardous duty pay provisions in 5 U.S.C. 5545(d) and related regulations, subject to the require-

ments and modifications described in paragraphs (i)(2) through (i)(6) of this section.

(2) In determining eligibility for hazardous duty pay, an authorized management official will apply occupational safety and health standards consistent with the permissible exposure limit promulgated by the Secretary of Labor under the Occupational Safety and Health Act of 1970 as published in Subtitle B, Chapter XVII, of title 29, United States Code, or, in the absence of a permissible exposure limit issued by the Secretary of Labor, other applicable standard promulgated by the Secretary.

(3) Subject to § 9901.105, the Secretary may establish new categories of hazardous duty pay in addition to those found in Appendix A to subpart I of 5 CFR part 550. Components may request a new category of hazardous duty pay be established and must submit, with their request, the information required in 5 CFR 550.903(b).

(4) Except as provided in paragraphs (i)(5) and (i)(6) of this section, an employee is paid a hazard pay differential when he or she is assigned to and performs a duty specified in Appendix A to subpart I of 5 CFR part 550 or as provided under paragraph (i)(3) of this section.

(5) An employee will be eligible to receive hazardous duty pay when an authorized management official determines—

(i) One or more of the conditions requisite for such payment exist; and

(ii) Safety precautions, protective or mechanical devices, protective or safety clothing, protective or safety equipment, or other preventive measures have not reduced the element of hazard below the permissible exposure limits promulgated by the Secretary of Labor or any applicable standard promulgated by the Secretary, consistent with paragraph (i)(2) of this section.

(6) Hazard pay differentials are not payable to employees in occupations or jobs in which unusual physical risk is an inherent characteristic of the occupation or job, such as police officer, emergency medical technician, test pilot, ordnance/explosives/incendiary inspector, and engineering technician performing inspection functions inside

fuel storage tanks, tunnels, or shafts. The classification of the employee's position (*i.e.*, determination of pay band level) includes a consideration of the hazardous duty or physical hardship. For the purposes of this paragraph, the phrase "includes a consideration of the hazardous duty" means that the duty is one element considered in determining the pay band level of the position—*i.e.*, the knowledge, complexities, skills and abilities required to perform that duty are considered in the classification of the position. Such consideration does not require the hazardous duty or physical hardship to be pay band controlling.

(j) *Compensatory time off for travel.* (1) An employee is covered by the compensatory time off for travel provisions in 5 U.S.C. 5550b and related regulations, subject to the requirements and modifications described in paragraphs (j)(2) through (j)(7) of this section.

(2) The term "official duty station" as defined in the related regulations is not applicable; instead, the term "official worksite" is used to determine an employee's entitlement to compensatory time off for travel. The term "official worksite" has the meaning given in 5 CFR 531.605.

(3)(i) Time spent commuting between an employee's residence and the workplace (official or temporary worksite) is not creditable for the purpose of compensatory time off for travel, except as provided in paragraph (j)(3)(ii) of this section.

(ii) If an employee is required to travel to a temporary worksite and if the one-way commuting time exceeds the employee's normal one-way commuting time by more than 1 hour, the commuting time beyond 1 hour may be credited.

(4) If an employee is required to travel directly between his or her residence and a transportation terminal, the travel time is creditable as time in a travel status. The travel time outside regular working hours directly to or from a transportation terminal is creditable as time in a travel status. However, if the travel occurs on a day that the employee is regularly scheduled to work, the time the employee would have spent in normal home-to-work or

work-to-home commuting must be deducted.

(5) An employee earns compensatory time off for time spent in a travel status away from the official worksite when such time is not otherwise compensable.

(6) Employees must file requests for credit of compensatory time off for travel within 10 workdays after returning to the official duty station, or within 10 workdays of returning from temporary duty (TDY) assignment or approved leave which immediately follows the TDY during which the compensatory time off for travel was earned, by submitting a travel itinerary, or any other documentation acceptable to the employee's supervisor, in support of the request. If not submitted within 10 workdays, the employee will forfeit his or her claim to the compensatory time off for travel. Compensatory time off for travel will be credited in increments of 6 minutes or 15 minutes and will be tracked and managed separately from other forms of compensatory time off.

(7)(i) When an employee moves from an NSPS position to a non-NSPS position within the Department, in which the employee will be eligible for compensatory time off for travel under 5 CFR part 550, subpart N, he or she will retain unused compensatory time off for travel. The time elapsed from the end of the pay period in which the compensatory time off was earned through the date of conversion will count as elapsed time in applying the limit for usage in 5 CFR part 550, subpart N.

(ii) When an employee moves from a non-NSPS position to an NSPS position within the Department, he or she will retain unused compensatory time off for travel. The time elapsed from the end of the pay period in which the compensatory time off was earned through the date of conversion will count as elapsed time in applying the limit for usage established under 5 CFR 550.1407.

(k) *Compensatory time off for religious observances.* An employee is covered by the compensatory time off for religious observances provisions in 5 U.S.C. 5550a and related regulations, subject to the following requirements and modifications:

(1) An employee's request for time off should not be granted without simultaneously scheduling the hours during which the employee will work to make up the time (unless the employee earned the needed hours in advance); and

(2) An employee may not receive payment for any unused compensatory time off for religious observances under any circumstances. This prohibition against payment applies to surviving beneficiaries in the event of the individual's death.

(1) *Air traffic controller differential.* (1) The air traffic controller differential provisions in 5 U.S.C. 5546a are waived and not applicable to NSPS employees, except for subsections (a)(1) and (d) of that section.

(2) An employee is covered by the air traffic controller differential provisions in subsections (a)(1) and (d) of 5 U.S.C. 5546a, subject to the modification described in paragraph (1)(3) of this section.

(3) The reference to the grade levels of GS-9 and GS-11 in 5 U.S.C. 5546a(a)(1) must be construed to mean a comparable level of work as determined under the NSPS classification structure.

§ 9901.363 Premium pay for health care personnel.

(a) *Coverage.* (1) This section applies to DoD health care personnel covered under NSPS who may be eligible for premium pay, as described in paragraphs (b), (c), and (d) of this section. For the purpose of this section, *health care personnel* means employees providing direct patient care services or services incident to direct patient care services. Examples include employees in the following occupations: nurse, biomedical engineer, dietitian, dental hygienist, psychologist, and medical records technician.

(2) Premium pay under this section is not considered part of basic pay for any purpose, nor is it used in computing a lump-sum payment for leave under 5 U.S.C. 5551 or 5552.

(b) *On-call premium pay.* (1) When health care personnel are not otherwise compensated for on-call time, heads of Components may authorize on-call premium pay under this section for offi-

cially scheduled "on-call" time which requires these employees to restrict their activities sufficiently to be available to return to the worksite promptly when it is necessary.

(2) To be paid on-call premium pay, an employee must be officially scheduled to be on-call outside his or her regular duty hours or during hours on a holiday when the employee is excused from regular duty.

(3) An employee may not be scheduled to be on-call unless it is essential for the employee to be immediately available to return to the worksite.

(4) An employee officially scheduled to be on-call will be paid 15 percent of his or her adjusted salary hourly rate for each hour of on-call status.

(5) An employee may not receive on-call pay during periods of actual work. When an employee on-call is required to return to work status, on-call pay will be suspended. When released from the requirement to perform actual work, the employee will return to the remaining scheduled on-call status.

(6) An employee may not be charged leave during periods of regularly scheduled on-call duty; nor may such an employee receive on-call premium pay when, because of leave or other authorized absence, the employee is not expected to be able to return to the worksite immediately.

(c) *Night pay for health care personnel.*

(1) Health care personnel working a tour of duty, any part of which falls between 6 p.m. and 6 a.m., with 4 or more hours falling between 6 p.m. and 6 a.m., will be paid additional pay for each hour of work on such tour. When fewer than 4 hours of work fall between 6 p.m. and 6 a.m., health care personnel will be paid additional pay for each hour of work performed between 6 p.m. and 6 a.m. Night pay for health care personnel is 10 percent of the employee's hourly rate of adjusted salary. An employee receiving night pay under this section may not also receive night pay under § 9901.362(c).

(2) Health care personnel are entitled to pay for night duty for a period of paid absence only for a period of court leave, military leave, time off awards under 5 U.S.C. 4502(e), or compensatory time off for religious observances.

(3) When excused from work because of a holiday or in-lieu-of holiday, health care personnel are entitled to the night pay that would have applied had they not been excused from work.

(d) *Pay for weekend duty for health care personnel.* (1) Health care personnel who work a tour of duty, any part of which falls in the 2-day period between midnight Friday and midnight Sunday, will be paid additional pay for each hour of work during such tour. Health care personnel who have two separate tours of duty, each of which qualify as weekend duty, will be paid additional pay for each hour of both tours. Additional pay for weekend duty is 25 percent of the employee's hourly rate of adjusted salary. An employee receiving pay for weekend duty may not also receive pay for Sunday work under §9901.362(d).

(2) When on court leave, military leave, time off awarded under 5 U.S.C. 4502(e), or compensatory time off for religious observances, health care personnel are entitled to pay for weekend duty they otherwise would have received.

§9901.364 Foreign language proficiency pay.

(a) *General provisions.* (1) This section applies to employees who may be paid Foreign Language Proficiency Pay (FLPP) if they are certified as proficient in a foreign language the Secretary has determined to be necessary for national security interests, and if they are not receiving FLPP as provided in 10 U.S.C. 1596 and 10 U.S.C. 1596a.

(2) The Secretary is authorized to publish an annual list of foreign languages necessary for national security interests and to establish overall policy for administration of the Defense Language Program.

(3) Employees may be certified as proficient in a necessary foreign language using criteria and procedures established by the Secretary and receive FLPP.

(b) *Eligibility criteria.* An authorized management official delegated the authority for approving payment must document that an employee meets eligibility criteria before authorizing FLPP. The documentation includes—

(1) Certification within the last 12 months of the employee's proficiency in a foreign language the Secretary has determined necessary for national security interests;

(2) Affirmation that the employee does not currently receive comparable pay under 10 U.S.C. 1596 or 1596a;

(3) Certification of the employee's foreign language proficiency level renewed annually; and

(4) Certification based on an annual test that is part of the Defense Language Proficiency Test System.

(c) *Amount and method of payment.* The decision to grant FLPP, including the amount, will be reviewed and approved by an official who is at a higher level than the official who made the initial decision, as determined by the Component, unless there is no official at a higher level in the organization. The amount of FLPP received by the employee, not to exceed \$500 per pay period, will be determined based on the following considerations:

(1) The employee's measured proficiency level in the necessary language;

(2) The need for the employee's particular language skills;

(3) The difficulty of recruiting or retaining employees with the same proficiencies;

(4) The extent to which the employee performs tasks requiring proficiency;

(5) The number of necessary languages in which the employee is proficient; and

(6) Other considerations authorized by the Secretary.

(d) *Treatment for other purposes.* FLPP is not considered part of basic pay for any purpose and does not count towards retirement, insurance, or any other benefit related to basic pay. FLPP is not pay for purposes of a lump-sum payment for leave under 5 U.S.C. 5551 or 5552.

(e) *Termination.* The authorized management official as determined by the Component may reduce or terminate FLPP at any time when the official determines—

(1) The need for the employee's language capability has been reduced or eliminated; or

(2) The employee no longer meets the certification requirements.

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(f) *Miscellaneous.* (1) The minimum qualifying level may not be less than Interagency Language Roundtable Level 2 proficiency in at least two skills (listening, reading, speaking, or writing, as required).

(2) FLPP may be paid for proficiency in multiple languages; however, the total amount may not exceed \$500 per pay period.

CONVERSION PROVISIONS

§ 9901.371 Conversion into NSPS pay system.

(a) *Introduction.* This section describes the pay-setting provisions that apply when DoD employees are converted into the NSPS pay system established under this subpart. (See § 9901.231 for conversion rules related to determining an employee's career group, pay schedule, and band.) An affected employee may convert from the GS system, the SL/ST system, or the SES system (or such other systems designated by the Secretary as DoD may be authorized to include under 5 U.S.C. 9902), as provided in § 9901.302. For the purpose of this part (except § 9901.372), the terms “convert,” “converted,” “converting,” and “conversion” refer to employees who become covered by the NSPS pay system without a change in position (as a result of a coverage determination made under § 9901.102(b)) and exclude employees who move from a noncovered position to a position already covered by the NSPS pay system.

(b) *Implementing issuances.* The Secretary will issue implementing issuances prescribing the policies and procedures necessary to implement these conversion provisions.

(c) *Bar on pay reduction.* Subject to paragraph (e) of this section, employees will be converted into the NSPS pay system without a reduction in their adjusted salary rate. (As defined in § 9901.304, the term “adjusted salary” means base salary plus any applicable locality payment under 5 U.S.C. 5304, special rate supplement under 5 U.S.C. 5305, local market supplement under § 9901.332, or equivalent supplement under other legal authority.)

(d) *Rate comparison.* For the purpose of determining whether conversion into

NSPS constitutes an adverse action for reduction of pay under 5 U.S.C. chapter 75, subchapter II (dealing with adverse actions), an employee's rate of basic pay includes any applicable locality payment under 5 U.S.C. 5304, special rate supplement under 5 U.S.C. 5305, local market supplement under § 9901.332, or equivalent supplement under other legal authority. The rate of basic pay immediately before conversion must be adjusted as described in paragraph (e) of this section before comparing that rate of basic pay to the initial NSPS rate of basic pay.

(e) *Simultaneous actions.* If another personnel action (e.g., promotion, geographic movement) takes effect on the same day as the effective date of an employee's conversion to the new pay system, the other action will be processed under the rules pertaining to the employee's former system before processing the conversion action.

(f) *Temporary promotion prior to conversion.* An employee on a temporary promotion at the time of conversion will be returned to his or her official position of record prior to processing the conversion (as provided in § 9901.231(c)), and pay will be set consistent with the pay-setting rules of the pay system that applies prior to conversion. For GS employees, pay in the permanent position of record must be reconstructed to reflect any increase that would have otherwise occurred if the employee had not been temporarily promoted, as provided in GS pay-setting regulations. If the employee is temporarily promoted immediately after the conversion, pay will be set under the rules for promotion increases under the NSPS pay system. (See also paragraph (k) of this section.)

(g) *Grade retention prior to conversion.* An employee on grade retention immediately before conversion must be converted to a pay band based on the grade of his or her assigned permanent position of record (not the retained grade), as provided in § 9901.231(d), but the employee's base and adjusted salary while in grade retention status will be used in applying this section (e.g., in setting the initial NSPS base and adjusted salary and in determining the amount of any within-grade increase adjustment). After conversion and any within-grade

increase adjustment under paragraph (j) of this section, if the employee's base salary exceeds the rate range for the assigned pay band, the employee will be granted pay retention, subject to the conditions described in §9901.356.

(h) *Pay retention prior to conversion.* For an employee on pay retention under 5 U.S.C. 5363 immediately before conversion, the employee's pay will be realigned so that the employee's NSPS adjusted salary (consisting of base salary plus any applicable local market supplement) equals the employee's retained rate before conversion. If the employee's base salary (after realignment) exceeds the rate range for the assigned pay band, the employee will be granted pay retention, subject to the conditions described in §9901.356.

(i) *Conversion adjustments.* The only NSPS base salary adjustments that may be made in conjunction with an employee's conversion into NSPS are those identified in paragraphs (j) through (m) of this section.

(j) *Within-grade increase (WGI) adjustment.* (1) Upon conversion to NSPS, a General Schedule (GS) employee (regardless of work schedule) who would otherwise be eligible for a within-grade increase (WGI), and who is paid below the maximum rate for their grade, will receive a prorated WGI adjustment to his or her NSPS base salary rate to account for the time (measured in calendar days) since the employee's last equivalent pay increase.

(2) The WGI adjustment is calculated based on the number of calendar days between the effective date of the employee's last equivalent increase and the date of conversion into NSPS, regardless of the number of days in a non-pay status (if any). The maximum adjustment may not exceed a full WGI.

(3) For an employee on a temporary promotion immediately before conversion, the employee's GS pay entitlements must be determined as provided in paragraph (f) of this section before calculating the WGI adjustment.

(4) For an employee entitled to grade retention immediately before conversion, the WGI adjustment is determined using the employee's retained grade and step.

(5) The WGI adjustment is not applicable to an employee entitled to pay

retention immediately before conversion.

(6) The WGI adjustment is not applicable to an employee whose performance has been determined to be below an acceptable level of competence under 5 CFR part 531, subpart D.

(7) An employee is entitled to a WGI adjustment in accordance with paragraphs (j)(1) through (6) of this section each time he or she occupies a position that is converted into NSPS under this part.

(k) *Special increase for employees on temporary promotion prior to conversion—*

(1) *General.* If an employee had a temporary promotion immediately before conversion, and if the position to which the employee was temporarily promoted becomes covered by NSPS, an authorized management official may temporarily reassign or temporarily promote the employee back to that position, subject to the same terms and conditions as the initial temporary promotion (e.g., if the temporary promotion was not to exceed 5 years and the action is a temporary reassignment under NSPS, the temporary reassignment may not exceed 5 years). When the employee is temporarily placed back into the position immediately after conversion, the pay-setting rules in paragraphs (k)(2) and (k)(3) of this section apply.

(2) *Temporary reassignment.* If the post-conversion action would be a temporary reassignment, the authorized management official may provide the employee with a temporary base salary increase up to the same base salary rate the employee was receiving during the temporary promotion (prior to conversion) in lieu of setting pay under the reassignment rules under §9901.353. This is a one-time exception to the limitations on reassignment increases imposed under §9901.353. Upon expiration of the temporary reassignment, pay will be set as specified in §9901.353(g) or paragraph (k)(4) of this section, as applicable.

(3) *Temporary promotion.* (i) If the post-conversion action would be a temporary promotion, the authorized management official may provide the employee with a temporary base salary increase up to the same base salary rate the employee was receiving during

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the temporary promotion (prior to conversion) or may set pay according to the promotion rules under § 9901.354 to provide a greater increase. Upon expiration of the temporary promotion, pay will be set as specified in § 9901.354(c) or paragraph (k)(4) of this section, as applicable.

(ii) The increase described in paragraph (k)(3)(i) of this section may also apply to an employee who is on a temporary promotion at the time that temporary promotion position converts to NSPS, even if the employee's permanent position of record has not yet converted. In this case, upon expiration of the temporary promotion, pay will be set under the rules of the applicable pay system.

(4) *Temporary placement becomes permanent.* If a temporary reassignment or promotion to an NSPS position under this paragraph (k) becomes permanent with no break, the employee's base salary will not change, but will continue at the rate received at the end of the temporary reassignment or promotion.

(1) *Special increases equivalent to GS promotion increase.* (1) During the first 12 months following conversion, employees who are not eligible for the Accelerated Compensation for Developmental Positions (ACDP) under § 9901.345 are eligible to receive (at the discretion of an authorized management official) a one-time base salary increase equivalent to a noncompetitive promotion increase the employee would have received but for conversion to NSPS. This paragraph may be applied only when the grade level of the promotion is encompassed within the same pay band, the employee's performance warrants the pay increase, and the promotion would have otherwise occurred during that period.

(2) An employee who is selected for a non-NSPS position that subsequently becomes covered by NSPS before the effective date of the employee's placement in the position is eligible to receive (at the discretion of an authorized management official) a one-time base salary increase equivalent to the increase the employee would have received had the placement been effected prior to the position becoming covered by NSPS. This paragraph may be applied only when the employee is not al-

ready in an NSPS-covered position on the effective date of the placement, and the effective date is within 12 months of the position becoming covered by NSPS. An employee who receives an increase under this paragraph is not eligible for the WGI adjustment described in paragraph (j) of this section.

(m) *Adjustment for physicians and dentists.* For a GS physician or dentist who was regularly receiving a physicians' comparability allowance or premium pay, the Component may increase the base salary after conversion to NSPS to account for the loss of such allowance or premium pay (since such payments are not authorized for physicians and dentists under NSPS). The Component must also consider the additional pay represented by any applicable targeted local market supplement in determining the rate at which the base salary should be set under this paragraph.

§ 9901.372 Conversion or movement out of NSPS pay system.

(a) *General.* (1) This section applies to the conversion or movement of employees out of the NSPS pay system to a different pay system. Under this section, when an NSPS employee is converted or moved to a GS position, a GS virtual grade and rate is established for the NSPS employee so that the employee is treated as a GS employee in applying GS pay-setting rules.

(2) For the purpose of this section (unless otherwise specified)—

(i) The terms "convert," "converted," "converting," and "conversion" refer to NSPS employees who become covered by a different pay system without a change in position (as a result of a determination made by the Secretary under § 9901.102(e) or as otherwise provided by law); and

(ii) The terms "move," "moved," "moving," and "movement" refer to NSPS employees who become covered by a different pay system through a change in position, rather than by conversion.

(b) *Classification of converted position.* Prior to converting an employee out of NSPS, an authorized management official, as defined by the Component, will review the duties of the employee's

current permanent position of record and classify the position's duties in accordance with Office of Personnel Management (OPM) classification guidance and/or other appropriate criteria to determine the appropriate title, series, and grade or pay band of the position in the new pay system. Employees occupying positions classified to NSPS-unique occupational series at the time of conversion out cannot be retained in those series, but must be assigned to the series that most closely represents the employee's current duties (*i.e.*, the duties of the former NSPS position).

(c) *Determining pay under new pay system.* When converting or moving an employee out of NSPS to another pay system, the pay-setting rules of the gaining system will apply. For the purpose of applying those rules, the employee's final pay under NSPS is determined based on the employee's NSPS permanent position of record (including band), official worksite, and pay as of the day immediately before the date of conversion or movement out of NSPS. An employee on a temporary reassignment or temporary promotion will be returned to his or her permanent position of record prior to conversion or movement. No personnel or pay action that, but for the conversion or movement out of NSPS, would have occurred under NSPS on the date of conversion or movement may be considered. Any personnel or pay action occurring on the date of conversion or movement must be processed under the rules of the gaining system. In the case of a conversion or movement to the General Schedule (GS) pay system, the supplemental rules in paragraph (d) of this section must be followed to determine a virtual GS grade and rate (as of the date before the employee's conversion or movement out of NSPS) that will be used in apply GS pay-setting rules.

(d) *Virtual GS grade and rate*—(1) *Virtual GS grade.* (i) Before an employee converts or moves out of NSPS under this paragraph, a virtual GS grade will be established for the purpose of applying GS pay-setting rules (*e.g.*, a promotion increase if the actual GS grade is higher than the virtual GS grade). This virtual GS grade will be based on a comparison of the NSPS employee's

current adjusted salary to the highest applicable GS rate range that would apply to the employee's NSPS permanent position of record considering only those GS grade levels and associated rate ranges that are included in the employee's assigned NSPS pay band. For the purpose of this section, a highest applicable GS rate range includes the following rate ranges: The GS locality rate schedule for the locality pay area in which the employee's NSPS official worksite is located; the special rate schedule based on the employee's position of record, official worksite, or other established conditions; the law enforcement officer special base rate schedule; or the GS base pay schedule. The grade-band conversion tables established in DoD's NSPS implementing issuances for the purpose of converting employees into NSPS must be used in determining which GS grades are covered by the employee's assigned NSPS pay band. For two-grade interval occupations, conversion may not be made to an intervening (even) grade level below GS-11.

(ii) If the employee's pay band covers one GS grade, the employee's virtual grade will be that grade.

(iii) For an employee in a pay band encompassing more than one GS grade, if the employee's adjusted salary equals or exceeds the step 4 rate of the highest applicable GS rate range for the highest GS grade encompassed within his or her assigned NSPS pay band, the employee's virtual grade will be that grade. If the employee's adjusted salary is lower than the step 4 rate, the adjusted salary is compared with the step 4 rate of the highest applicable GS rate range for the second highest GS grade encompassed within the employee's pay band. If the employee's adjusted salary equals or exceeds the step 4 rate of the second highest grade, the employee's virtual grade will be that grade. This process is repeated for each successively lower grade encompassed within the assigned band until a grade is found at which the employee's adjusted salary equals or exceeds the step 4 rate of the highest applicable GS rate range for that grade.

(iv) Notwithstanding paragraph (d)(1)(iii) of this section, if the employee's adjusted salary exceeds the maximum rate of the highest applicable GS rate range for the assigned GS grade determined under paragraph (d)(1)(iii) of this section but fits in the highest applicable GS rate range for the next higher grade (*i.e.*, is greater than or equal to the rate for step 1 but less than the rate for step 4), then the employee's virtual GS grade will be that higher grade.

(v) Notwithstanding paragraph (d)(1)(iii) of this section, an employee's virtual GS grade may not be less than the permanently assigned GS grade the employee held upon conversion into NSPS (for an employee who was converted as described in § 9901.371), unless, since that time, the employee has undergone—

(A) A voluntary reduction in band or reduction in base salary;

(B) An involuntary reduction in band or reduction in base salary based on unacceptable performance and/or conduct; or

(C) A reduction in band based on a reduction in force (RIF) or classification action.

(vi) If the employee's adjusted salary exceeds the maximum rate of the highest applicable GS rate range for the highest grade encompassed by his or her assigned pay band, the employee's virtual grade will be that highest GS grade.

(vii) If the employee's adjusted salary is less than the step 4 rate of the highest applicable GS rate range for the lowest GS grade encompassed within his or her assigned NSPS pay band, the employee's virtual grade will be the lowest GS grade in the band.

(2) *Virtual GS rate.* (i) Once a virtual GS grade has been established, a virtual GS rate will be set (before any pay-related action that would take effect on the date of the employee's conversion or movement out of NSPS). As of the day before the date of conversion or movement out of NSPS, the employee's NSPS adjusted salary will be compared to the highest applicable GS rate range for the established virtual grade. If the employee's adjusted salary rate falls within that range, the virtual rate will be set equal to that adjusted sal-

ary rate. (Since this virtual GS rate is used only as a basis for setting the employee's rate in a new non-NSPS position, it is not necessary to set it at a GS step rate at this stage.) If an employee's adjusted salary is less than the minimum rate of the highest applicable GS rate range for the virtual GS grade, his or her virtual rate will be set at the minimum step rate. If the employee's adjusted salary is greater than the maximum rate of the highest applicable GS rate range for the virtual GS grade, his or her virtual rate will be set at the maximum step rate or at a retained rate set using GS pay retention rules in 5 CFR part 536 (if the employee is eligible for pay retention under those rules).

(ii) If the virtual rate derived under paragraph (d)(2)(i) of this section is an adjusted salary rate that includes a locality payment or special rate supplement, an employee's virtual GS base salary rate will be derived based on that adjusted salary rate.

(iii) The virtual GS grade and rates established under this paragraph (d) will be used in applying GS pay administration rules in setting pay in the new GS position (*e.g.*, the GS promotion rules, pay retention rules, and the maximum payable rate rule). (Since the NSPS system did not continue coverage under the grade retention provision in 5 U.S.C. 5362, grade retention is not applicable to NSPS employees who convert or move to a GS position.) As required by paragraph (c) of this section, any pay action effective on the date of conversion or movement from NSPS to the GS pay system will be processed under GS pay administration rules.

(e) *GS within-grade increases.* Service under NSPS is creditable for within-grade increase purposes upon conversion or movement to a GS position under this section to the extent provided under 5 CFR part 531, subpart D.

(f) *Comparison of rates of basic pay.* For the purpose of determining whether the conversion or movement out of NSPS under this section is an adverse action for reduction of pay under 5 U.S.C. chapter 75, subchapter II (dealing with adverse actions), an employee's rate of basic pay includes any applicable locality payment under 5

U.S.C. 5304, special rate supplement under 5 U.S.C. 5305, local market supplement under § 9901.332, or equivalent supplement under other legal authority. This comparison is made before any pay-related action (e.g., geographic movement) under the gaining system that takes effect on the date of conversion or movement.

Subpart D—Performance Management

§ 9901.401 Purpose.

(a) This subpart establishes a performance management system as authorized by 5 U.S.C. 9902.

(b) The performance management system established under this subpart is designed to promote and sustain a high-performance culture. The implementation and operation of the system will provide for the following elements:

(1) Adherence to merit principles set forth in 5 U.S.C. 2301;

(2) A fair, credible, and transparent employee performance appraisal system;

(3) A link between the performance management system and DoD's strategic plan;

(4) A means for ensuring employee involvement in the design and implementation of the system;

(5) Adequate training and retraining for supervisors, managers, and employees in the implementation and operation of the performance management system;

(6) A process for ensuring ongoing performance feedback and dialogue among supervisors, managers, and employees throughout the appraisal period, and setting timetables for review;

(7) Effective safeguards to ensure that the management of the system is fair and equitable and based on employee performance;

(8) A means for ensuring that adequate agency resources are allocated for the design, implementation, and administration of the performance management system; and

(9) A pay-for-performance evaluation system to better link individual pay to performance and provide an equitable method for appraising and compensating employees.

§ 9901.402 Coverage.

(a) This subpart applies to eligible employees and positions in the categories listed in paragraph (b) of this section, subject to a determination by the Secretary under § 9901.102.

(b) The following employees and positions in organizational and functional units are eligible for coverage under this subpart:

(1) Employees and positions that would otherwise be covered by 5 U.S.C. chapter 43;

(2) Employees and positions excluded from chapter 43 by OPM under 5 CFR 430.202(d) prior to the date of coverage of this subpart; and

(3) Such others designated by the Secretary as DoD may be authorized to include under 5 U.S.C. 9902.

(c) Except as provided in § 9901.408, this subpart does not apply to employees who have been, or are expected to be, employed in an NSPS position for less than a minimum period (as described in § 9901.407) during a single 12-month period.

§ 9901.403 Waivers.

When a specified category or group of employees is covered by the performance management system established under this subpart, the provisions of 5 U.S.C. chapter 43 are waived with respect to that category of employees.

§ 9901.404 Definitions.

In this subpart—

Appraisal means the review and evaluation of an employee's performance.

Appraisal period has the meaning given that term in § 9901.103.

Competencies has the meaning given that term in § 9901.103.

Contribution has the meaning given that term in § 9901.103.

Contributing Factors has the meaning given that term in § 9901.103.

Job Objectives has the meaning given that term in § 9901.103.

Minimum period means the period of time during which an employee will perform under one or more approved NSPS performance plans before receiving a rating of record.

Pay-for-performance evaluation system means the performance management system established under this subpart to link individual pay to performance

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and provide an equitable method for evaluating performance and compensating employees.

Pay Pool Manager has the meaning given that term in § 9901.103.

Pay Pool Panel has the meaning given that term in § 9901.103.

Performance has the meaning given that term in § 9901.103.

Performance expectations means the duties, responsibilities, and competencies required by, or objectives associated with, an employee's position and the contributions and demonstrated competencies management expects of an employee, as described in § 9901.406.

Performance management means applying the integrated processes of setting and communicating performance expectations, monitoring performance and providing feedback, developing performance and addressing poor performance, and rating and rewarding performance in support of the organization's goals and objectives.

Performance management system means the policies and requirements established under this subpart, as supplemented by implementing issuances, for setting and communicating employee performance expectations, monitoring performance and providing feedback, developing performance and addressing poor performance, and rating and rewarding performance. It incorporates and operationalizes the elements set forth in § 9901.401(b).

Performance Review Authority has the meaning given that term in § 9901.103.

Rating official means a representative of management, usually the immediate supervisor, who evaluates and assesses employee performance and recommends a rating of record, share assignment, and payout distribution for review by the Pay Pool Panel.

Rating of record has the meaning given that term in § 9901.103.

Unacceptable performance has the meaning given that term in § 9901.103.

§ 9901.405 Performance management system requirements.

(a) The Secretary may issue implementing issuances further defining a performance management system for NSPS employees, subject to the requirements set forth in this subpart.

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(b) The NSPS performance management system—

(1) Provides for the appraisal of the performance of each employee annually;

(2) Holds supervisors and managers accountable for effectively managing the performance of employees under their supervision as set forth in paragraph (c) of this section;

(3) Specifies procedures for setting and communicating performance expectations, monitoring performance and providing feedback, and developing, rating, and rewarding performance;

(4) Specifies the criteria and procedures to address the performance of employees who are detailed or transferred and for employees in other special circumstances;

(5) Provides for the following multiple rating levels:

Rating of record	Rating of record descriptor
Level 5	Role Model.
Level 4	Exceeds Expectations.
Level 3	Valued Performer.
Level 2	Fair.
Level 1	Unacceptable.

(6) Specifies rounding rules for average adjusted ratings as follows:

(i) The combination of the job objective rating and the contributing factor assessment results in an adjusted rating for each job objective;

(ii) The job objective adjusted ratings are averaged to obtain the employee's raw score;

(iii) Any objective rated as "NR" is not counted when averaging ratings;

(iv) When the employee's raw score ends with .51 or higher, the rating is rounded to the next higher whole number;

(v) When the employee's raw score ends with .50 or lower, the rating is rounded to the next lower whole number; and

(vi) The resulting rounded score is the recommended rating of record.

(c) In fulfilling the requirements of paragraph (b) of this section, supervisors and managers will—

(1) Clearly communicate performance expectations and hold employees responsible for accomplishing them;

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(2) Make meaningful distinctions among employees based on performance and contribution;

(3) Foster and reward excellent performance;

(4) Address poor performance; and

(5) Assure that employees are assigned a rating of record.

§ 9901.406 Setting and communicating performance expectations.

(a) Performance expectations will support and align with the mission and strategic goals, organizational program and policy objectives, annual performance plans, and other measures of performance.

(b) Performance expectations will be communicated to the employee in writing prior to holding the employee accountable for them.

(c) Notwithstanding the requirements in paragraphs (d) through (g) of this section, employees are accountable for demonstrating professionalism and appropriate standards of conduct and behavior, such as civility and respect for others.

(d) In addition to the requirement in paragraph (c) of this section, supervisors and managers will be held accountable through their performance expectations for how well they plan, monitor, develop, correct, and assess subordinate employees' performance.

(e) Performance expectations include—

(1) Goals or objectives that set general or specific performance targets at the individual, team, and/or organizational level;

(2) Organizational, occupational, or other work requirements, such as standard operating procedures, operating instructions, manuals, internal rules and directives, and/or other instructions that are generally applicable and available to the employee; and

(3) Competencies an employee is expected to demonstrate on the job, and/or the contributions an employee is expected to make.

(f) Performance expectations may be amplified through particular work assignments or other instructions (which may specify the quality, quantity, accuracy, timeliness, or other expected characteristics of the completed assignment, or some combination of such

characteristics). Such assignments and instructions need not be in writing.

(g) Supervisors will involve employees, insofar as practicable, in the development of their performance expectations. However, final decisions regarding performance expectations are within the sole and exclusive discretion of management.

(h) Performance expectations are subject to higher- or second-level review to ensure consistency and fairness within and across organizations.

(i) Performance expectations that comprise a performance plan are considered to be approved when the supervisor has communicated the performance plan to the employee in writing.

§ 9901.407 Minimum period of performance.

(a) Only employees who have completed the minimum period under one or more NSPS approved performance plans may be issued a rating of record in accordance with the procedures prescribed by this subpart.

(b) The minimum period of performance is 90 calendar days.

(1) Periods during which an employee is in a leave status may not be applied toward the 90-day minimum.

(2) If an employee has a break in NSPS-covered service (e.g., due to job change to a non-NSPS position, resignation), the service performed prior to the break may not be used to satisfy the 90-day minimum period. A break caused by a situation described in § 9901.342(i) through (1) is not considered a break for this purpose.

(c) Employees who have not completed the minimum period of performance during the applicable appraisal period will not be rated and will not be eligible for a performance payout unless otherwise provided in § 9901.342(i) through (1).

§ 9901.408 Employees on time-limited appointments.

Employees who are appointed for less than 90 days—

(a) Will be given performance expectations that are linked to the organization's strategic plan; and

(b) May receive an evaluation at the end of the appointment which—

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(1) Consists of a narrative description addressing employee performance, accomplishments and contributions during that appointment; and

(2) May serve as documentation and justification for recognition under 5 U.S.C. chapter 45.

§ 9901.409 Monitoring and developing performance.

(a) In applying the requirements of the performance management system and its implementing issuances and policies, supervisors will—

(1) Monitor the performance of their employees and their contribution to the organization;

(2) Provide ongoing (*i.e.*, regular and timely) feedback to employees on their actual performance with respect to their performance expectations, including one or more interim performance reviews during each appraisal period; and

(3) Document at least one interim performance review. Documented interim reviews are not required for overall periods of performance of less than 180 days.

(b) Developing performance is integrated with the performance management process and is a shared responsibility of management and employees. Developing performance includes but is not limited to—(1) Coaching and mentoring employees;

(2) Reinforcing strengths and addressing weaknesses; and

(3) Discussing employee development opportunities.

§ 9901.410 Addressing performance that does not meet expectations.

(a) If at any time during the appraisal period a supervisor determines that an employee's performance is not meeting expectations, the supervisor will—

(1) Identify and communicate to the employee the specific performance deficiencies that require improvement;

(2) Consider the range of options available to address the performance deficiency, including remedial training, improvement periods, reassignment, oral warnings, letters of counseling, written reprimands, or adverse action (including a reduction in rate of

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basic pay or pay band or a removal); and

(3) Take appropriate action to address the deficiency, taking into account the circumstances, including the nature and gravity of the unacceptable performance and its consequences.

(b) Adverse actions taken based on unacceptable performance and/or conduct will be taken in accordance with the provisions in 5 U.S.C. chapter 75 or other appropriate procedures if not covered by chapter 75, such as procedures for National Guard Technicians under 32 U.S.C. 709(f).

§ 9901.411 Appraisal period.

(a) Except as provided in paragraphs (a)(1) through (3) and (b) of this section, the appraisal period will be October 1 to September 30.

(1) The appraisal period may begin after October 1 and end after September 30 for newly converted groups of employees;

(2) The appraisal period may begin after October 1 for employees who move to an NSPS position from a non-NSPS position after that date; and

(3) The appraisal period may end between July 3 and September 30 for employees receiving early annual recommended ratings.

(b) If, by the end of the appraisal period, an employee has not met the minimum period of performance, management may extend the appraisal period provided such extensions do not—

(1) Delay the payout for the applicable pay pool; or

(2) Extend beyond the rating of record effective date.

(c) The effective date of ratings of record will be January 1, except for additional ratings of record as described in § 9901.412(b)(2).

(d) The effective date of a rating of record described in § 9901.412(b)(2) is the date the rating is final, as described in paragraph (g) of § 9901.412.

§ 9901.412 Rating and rewarding performance.

(a) Forced distribution of ratings (setting pre-established limits for the percentage or number of ratings that may be assigned at any level) is prohibited.

(b) An appropriate rating official—

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(1) Will prepare and recommend a rating of record after the completion of the appraisal period; and

(2) May recommend an additional rating of record following an unacceptable rating of record to reflect a substantial and sustained change in the employee's performance since the last rating of record.

(c) The recommended rating of record is subject to higher-level review.

(d) A rating of record will assess an employee's performance with respect to his or her performance expectations, as amplified through work assignments or other instructions, and/or relative contributions.

(e) If an employee engages in work-related misconduct and the nature or severity of that misconduct has an impact on the execution of his or her duties, that of the team, and/or that of the organization, the impact may be considered in the employee's rating of record.

(f) A Pay Pool Panel will —

(1) Review recommended ratings of record, share assignments, and payout distributions, and make adjustments, which in the panel's view would result in equity and consistency across the pay pool; and

(2) Afford the rating official the opportunity to provide further justification of a recommended rating of record before a change to that rating becomes final.

(g) Consistent with the requirements of merit system principles and this part, the Pay Pool Manager is the approving authority for Pay Pool Panel recommendations concerning ratings of record, share assignments, and payout distribution. A rating of record is considered final when issued to the employee with all appropriate reviews and signatures.

(h) An appropriate rating official will communicate the final rating of record, share assignment, and payout distribution to the employee.

(i) Once the minimum performance period is met and an employee is eligible for a rating of record, the rating of record of an employee may not be lowered based on an approved absence from work, including the absence of a disabled veteran to seek medical treat-

ment as provided in Executive Order 5396.

(j) A rating of record issued under this subpart—

(1) Is an official rating of record for the purpose of any provision of this title for which an official rating of record is required;

(2) Will be transferred between subordinate organizations and to other Federal departments or agencies in accordance with implementing issuances;

(3) Will be used as a basis for—

(i) A pay determination under any applicable pay rules;

(ii) Determining reduction-in-force retention standing; and

(iii) Such other action that the Secretary considers appropriate, as specified in implementing issuances;

(4) Will cover a specified appraisal period; and

(5) Will not be carried over as the rating of record for a subsequent appraisal period without an actual evaluation of the employee's performance during the subsequent appraisal period.

(k) Employees who change pay pools after the last day of the appraisal period and before the effective date of the payout will be evaluated and assigned a rating of record by the Pay Pool Manager associated with the pay pool of record on the last day of the appraisal period and the share assignment and payout distribution determination will be made in accordance with §9901.342(g).

(l)(1) An early annual recommended rating of record will be issued when—

(i) The supervisor (or rating official if different) ceases to exercise the duties relative to monitoring, developing, and rating employee performance within 90 days before the end of the appraisal period; or

(ii) The employee is reassigned, promoted, or reduced in band resulting in the assignment of a new rating official within 90 days before the end of the appraisal period.

(2) An employee who is eligible for a recommended rating of record or an early annual recommended rating of record at the time they move to a position outside of NSPS will be entitled to a rating of record. Such ratings of record must be approved through the Pay Pool Panel process.

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(m) At any time prior to the last 90 days of the appraisal period, a supervisor or other rating official may prepare a performance assessment (e.g., close-out assessment) for the purpose of providing input on an employee's performance to a new supervisor. Such an assessment is not a rating of record (recommended or final).

§ 9901.413 Reconsideration of ratings.

(a) *Nonbargaining unit employees.* (1) A rating of record or job objective rating may be challenged by a nonbargaining unit employee only through the reconsideration process specified in this subpart and implementing issuances. This process will be the sole and exclusive agency administrative process for all nonbargaining unit employees to challenge a rating of record.

(2) Consistent with this part, Pay Pool Managers will decide job objective rating and rating of record reconsiderations.

(3) If the Pay Pool Manager decision is challenged, consistent with this part, the Performance Review Authority will make a final decision.

(4) A share assignment determination, payout distribution determination, or any other payout matter will not be subject to the reconsideration process or any other agency administrative grievance system.

(b) *Bargaining unit employees.* (1) Negotiated grievance procedures are the exclusive administrative procedures for bargaining unit employees to challenge a rating of record or job objective rating as provided for in 5 U.S.C. 7121.

(2) If a negotiated grievance procedure is not available to a bargaining unit employee or challenging a rating of record or job objective rating is outside the scope of the employee's negotiated grievance procedure, a bargaining unit employee may challenge a rating of record or job objective rating in accordance with this subpart and implementing issuances.

(c) *Recalculation based on adjusted job objective rating or rating of record.* In the event a reconsideration or negotiated grievance decision results in an adjusted job objective rating or rating of record the revised rating will be referred to the Pay Pool Manager for re-

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calculation of the employee's performance payout amount and distribution.

(1) Any adjustment to salary will be retroactive to the effective date of the performance payout.

(2) Salary adjustments will be based on the share range appropriate for the adjusted rating of record as identified in § 9901.342(f).

(3) Share values for the adjusted rating of record will reflect the share value paid to other members across the pay pool for that rating cycle.

(4) Decisions made through the reconsideration process or a negotiated grievance procedure will not result in recalculation of the payout made to other employees in the pay pool.

(d) *Alternative dispute resolution.* Alternative dispute resolution techniques, such as mediation, interest-based problem-solving, or others, may be pursued at any time during the reconsideration process consistent with the Component's policies and procedures.

Subpart E—Staffing and Employment

AUTHORITY: 5 U.S.C. 9902.

SOURCE: 74 FR 2764, Jan. 16, 2009, unless otherwise noted.

GENERAL

§ 9901.501 Purpose.

(a) This subpart sets forth policies and procedures for the recruitment for, and appointment to, positions; and assignment, reassignment, detail, transfer, or promotion of employees, consistent with 5 U.S.C. 9902(a) and (i).

(b) The Secretary will comply with merit principles set forth in 5 U.S.C. 2301 and with 5 U.S.C. 2302 (dealing with prohibited personnel practices).

(c) The Secretary will adhere to veterans' preference principles set forth in 5 U.S.C. 2302(b)(11), consistent with 5 U.S.C. 9902(i).

§ 9901.502 Scope of authority.

When a specified category of employees, applicants, and positions is covered by the system established under this subpart, the provisions of 5 U.S.C.

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3301, 3302, 3304, 3317(a), 3318 and 3319 (except with respect to veterans' preference), 3321 (except 3321(a)(2)), 3324, 3325, 3327, 3330, and 3341 are modified or waived and replaced with respect to that category except as otherwise specified in this subpart. In accordance with § 9901.101, the Secretary may prescribe implementing issuances to carry out the provisions of this subpart.

§ 9901.503 Coverage.

(a) At his or her sole and exclusive discretion, the Secretary may decide to apply this subpart to a specific category or categories of eligible civilian employees in organizations and functional units of the Department at any time in accordance with the provisions of 5 U.S.C. 9902. However, no category of employee may be covered by this subpart unless that category is also covered by subpart D of this part.

(b) The following employees and positions in DoD organizational and functional units are eligible for coverage under this subpart:

(1) Employees and positions who would otherwise be covered by 5 U.S.C. chapter 33 (excluding members of the Senior Executive Service); and

(2) Such others designated by the Secretary as authorized under 5 U.S.C. 9902.

§ 9901.504 Definitions.

In this subpart—

Career conditional employee means an individual appointed without time limit to a competitive service position in NSPS who does not meet the definition of a career employee.

Career employee means an individual appointed without time limit to a competitive service position in NSPS who has served 3 years of substantially continuous service as described in 5 CFR 315.201(b).

Competencies has the meaning given that term in § 9901.103.

Detail means the temporary assignment, other than temporary reassignment or temporary promotion, of an employee to another position or set of duties with the expectation that the employee will return to the permanent position of record upon expiration of the assignment. For pay and benefits purposes and for the purpose of part 351

of this title, an employee continues to encumber the position from which the employee was detailed.

Initial probationary period means the initial period of service immediately following an employee's appointment to the competitive or excepted service, as specified in § 9901.512, during which an authorized management official determines whether the employee fulfills the requirements of the position to which assigned.

Local commuting area is the geographic area that usually constitutes one area for employment purposes. It includes any population center (or two or more neighboring ones) and the surrounding localities in which people live and can reasonably be expected to travel back and forth daily to their usual place of employment.

Promotion has the meaning given that term in § 9901.103.

Reassignment has the meaning given that term in § 9901.103. For the purpose of part 351 of this title, an official position does not include a position to which an employee is reassigned on a temporary or time-limited basis.

Reduction in band has the meaning given that term in § 9901.103.

Supervisory probationary period means the first year of service immediately following an employee's initial appointment or placement in a supervisory position, as provided in 5 U.S.C. 3321(a)(2), during which an authorized management official determines whether the employee fulfills the requirements of the position to which assigned.

Temporary employee means an individual in the competitive or excepted service who is employed for a limited period of time not to exceed 1 year. The individual's appointment may be extended, up to a maximum established under § 9901.511(d), to perform the work of a position that does not require an additional permanent employee.

Term employee means an individual in the competitive service who is employed for a period of more than 1 year up to a maximum established under § 9901.511(d).

Time-limited employee means an individual in the excepted service who is employed for a period of more than 1

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year up to a maximum established under § 9901.511(d).

EXTERNAL RECRUITMENT AND INTERNAL PLACEMENT

§ 9901.511 Appointing authorities.

(a) *Competitive and excepted appointing authorities.* The Secretary may continue to use excepted and competitive appointing authorities under chapter 33 of title 5, U.S. Code, Governmentwide regulations, or Executive orders, as well as other statutes, and those individuals appointed under these authorities will be given career, career conditional, term or temporary appointments in the competitive service or permanent, time-limited, or temporary appointments in the excepted service, as appropriate. The competitive appointing authorities under this paragraph are subject to the procedures in part 330 of this title, except for 5 CFR 330.208 and 330.501.

(b) *Additional appointing authorities.*

(1) The Secretary and the Director may enter into written agreements providing for new excepted and competitive appointing authorities for positions covered by the National Security Personnel System, including noncompetitive appointments, and excepted appointments that may lead to a subsequent noncompetitive appointment to the competitive service.

(2) DoD and OPM will jointly publish a notice, and request comments, in the FEDERAL REGISTER when establishing a new competitive appointing authority or a new excepted appointing authority that may lead to a subsequent noncompetitive appointment to a competitive service position.

(3) The Secretary will prescribe appropriate implementing issuances to administer a new appointing authority established under paragraph (b) of this section.

(4) At least annually, a consolidated list of all appointing authorities established under this section and currently in effect will be published in the FEDERAL REGISTER.

(c) *Severe shortage/critical need hiring authority.* (1) The Secretary will determine when a severe shortage of candidates or a critical hiring need exists, as defined in 5 CFR part 337, subpart B,

for particular occupations, pay bands, career groups, and/or geographic locations. The Secretary may decide that such a shortage or critical need exists, or may make this decision in response to a written request from the head of a DoD Component. These authorities may be used without regard to competitive examination requirements described in § 9901.515. Public notice will be provided in accordance with 5 U.S.C. 3304(a)(3)(A).

(2) For each specific authority, the Secretary will document the basis for the severe shortage or critical hiring need, consistent with 5 CFR 337.204(b) or 337.205(b), as applicable.

(3) The Secretary may extend a direct hire authority if the Secretary determines there is or will continue to be a severe shortage of candidates or a critical hiring need for a particular position(s) as of the date the authority is due to expire.

(4) The Secretary will terminate or modify a specific authority to make appointments under this section when it is determined that the severe shortage or critical need upon which the authority was based no longer exists.

(5) The Secretary will notify OPM of determinations made under this paragraph.

(d) *Non-permanent appointing authorities.* (1) The Secretary may authorize appointments with time limits in the competitive or excepted service, as appropriate, when the need for an employee's services is not permanent. These appointments will be either temporary, term, or time-limited as defined below:

(i) *Temporary appointments.* Temporary appointments are for a specified period not to exceed 1 year and may be made in either the competitive or the excepted service. A temporary appointment may be extended for 2 additional years, in increments not to exceed 1 year, to a maximum of 3 years. Temporary appointments may be made and extended to positions involving intermittent or seasonal work without regard to the maximum time limits. The circumstances under which a temporary appointment is appropriate include, but are not limited to: Filling a position to address a temporary workload peak or to complete a temporary

project; meeting a temporary staffing need that is anticipated not to exceed a 1-year timeframe for reasons such as abolishment, reorganization, or contracting out of a function; anticipated reduction in funding; filling positions temporarily because the positions are expected to be needed for placement of permanent employees who would otherwise be displaced; or when the incumbent will be out of the position for a temporary period of time, but is expected to return. A temporary employee may be reassigned to another temporary position provided the total combined service under the temporary appointment does not exceed the maximum 3-year time limitation, the employee meets the qualification requirements of the position, and the conditions specific to the employee's appointing authority are met. Temporary appointments are made as follows:

(A) *Competitive service.* Temporary appointments to positions in the competitive service may be made using competitive procedures under §9901.515, using the severe shortage/critical need hiring authorities described in §9901.511(c), or by using direct hire authority procedures under 5 CFR part 337, as appropriate. Temporary appointments to positions in the competitive service also may be made noncompetitively, consistent with 5 CFR part 316, or by any noncompetitive appointing authorities granted to or by the Secretary.

(B) *Excepted service.* Temporary appointments to positions in the excepted service are made under the procedures prescribed in 5 CFR part 302.

(ii) *Term appointments in the competitive service.* (A) Term appointments are in the competitive service and will be for a period of more than 1 year, but not to exceed 5 years. The term appointment may be extended by an authorized management official for 1 additional year to a maximum of 6 years. The circumstances under which a term appointment is appropriate include, but are not limited to, project work, extraordinary workload, uncertainty of future funding, scheduled contracting out or abolishment of a function, the need to maintain permanent positions for placement of potential surplus employees, or when the incumbent will be

out of the position for a significant period of time, but is expected to return. A term employee may be promoted, reassigned or reduced in band to another term position provided the total combined service under the term appointment does not exceed the maximum 6-year time limitation and the employee meets the qualification requirements of the position.

(B) Term appointments may be made using competitive procedures under §9901.515, using the severe shortage/critical need hiring authorities described in §9901.511(c), or by using direct hire authority procedures under 5 CFR part 337, as appropriate. Term appointments also may be made noncompetitively consistent with 5 CFR part 316 or by any noncompetitive appointing authorities granted to or by the Secretary.

(iii) *Time-limited appointments in the excepted service.* Time-limited appointments are in the excepted service and will be for a period of more than 1 year. Time-limited appointments to positions in the excepted service are made under the procedures prescribed in 5 CFR part 302. A time-limited employee may be reassigned to another time-limited position in the excepted service provided the employee meets the qualification requirements of the position and the conditions specific to the appointing authority applicable to the employee.

(2) *Conversion to career conditional or career appointment.* A non-permanent employee serving in a competitive service position may be converted without further competition to a permanent position (*i.e.*, career or career conditional) if—

(i) The vacancy announcement met the requirements of §9901.515(a) and included the possibility of noncompetitive conversion to a permanent position (*i.e.*, career or career conditional) at a later date;

(ii) The individual was appointed using the competitive examining procedures set forth in §9901.515(b) and (c);

(iii) The employee completed at least 2 years of continuous service at Level 3 (Valued Performer) or better; and

(iv) The employee is converted to a career conditional or career position in

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the same pay schedule and band for which hired.

(e) *Tenure group.* For reduction in force purposes, NSPS employees appointed to the competitive service are placed in one of the tenure groups defined in 5 CFR 351.501(b) or, if appointed to the excepted service, one of the tenure groups defined in 5 CFR 351.502(b).

§ 9901.512 Probationary periods.

(a) *Initial probationary period.* (1) An employee who is given a career, career conditional, or term appointment in the competitive service or a permanent or time-limited appointment in the excepted service under this part is required to complete a probationary period when the employee:

(i) Is appointed from a competitive list of eligibles established under § 9901.515, using the severe shortage/critical need hiring authorities described in § 9901.511(c), or by using direct hire authority procedures under 5 CFR part 337; or

(ii) Is appointed to the competitive service either by special authority or by conversion under subpart F or G of 5 CFR part 315, unless specifically exempt from probation by the authority itself; or

(iii) Is reinstated, unless, during any period of service which affords a current basis for reinstatement, the employee completed an initial probationary period; or

(iv) Is appointed to a position in the excepted service under the procedures prescribed in part 302 of this title.

(2) An employee serving an initial probationary period at the time his or her permanent position is converted into NSPS, or at the time he or she is assigned from a non NSPS position to an NSPS position, or at the time he or she is reappointed through the DoD Priority Placement Program or Reemployment Priority List established under part 330 of this title after being involuntarily separated through no fault of the employee, will continue the probationary period; *i.e.*, the probationary period does not start over.

(3) The probationary period required by § 9901.512(a) is as follows:

- (i) Competitive service—1 year
- (ii) Excepted service—

(A) 2 years for non-preference eligibles;

(B) 1 year for preference eligibles.

(4) *Crediting service.* (i) Absence in an approved nonpay status while on the rolls (other than for compensable injury or military duty) is creditable up to a total of 22 workdays.

(ii) Service during an initial probationary period from which an employee is separated for performance or conduct does not count toward completion of probation required under a subsequent NSPS appointment.

(iii) The probationary period for part-time employees is computed on the basis of calendar time, in the same manner as for full-time employees. For intermittent employees, *i.e.*, those who do not have regularly scheduled tours of duty, each day or part of a day in pay status counts as 1 day of credit toward the 260 days (actual “work days” in a year, excluding weekends) needed to complete the 1-year probationary period. The probationary period may not be completed in less than 1 year calendar time.

(iv) Absence (whether on or off the rolls) due to compensable injury or military duty is creditable in full upon restoration to Federal service under part 353 of this title. An employee serving a probationary period who leaves Federal service to become a volunteer with the Peace Corps or the Corporation for National and Community Services serves the remainder of the probationary period upon reinstatement, provided the employee is reinstated within 90 days of termination of service as a volunteer or training for such service.

(5) *Termination of probationers for unsatisfactory performance and/or conduct.* When an authorized management official proposes to terminate a competitive service employee during his or her initial probationary period because his or her performance and/or conduct during this period fails to demonstrate his or her fitness or qualifications for continued employment, the official will follow procedures at 5 CFR 315.804.

(6) *Termination of probationers for conditions arising before appointment.* When an authorized management official proposes to terminate a competitive service employee during his or her initial

probationary or trial period for reasons based in whole or in part on conditions arising before the employee's appointment, the official will follow procedures at 5 CFR 315.805.

(7) *Appeals.* Under NSPS, a competitive service employee, who is terminated during the initial probationary period, will have limited appeal rights to the Merit Systems Protection Board (MSPB) under 5 CFR 315.806. In addition, any individual serving under a Veterans Recruitment Appointment, whose employment under the appointment is terminated within 1 year after the date of such appointment, will have the same right to appeal that termination as a career or career conditional employee has during the first year of employment in accordance with 5 CFR 315.806.

(b) *Supervisory probationary period.* Under NSPS, an employee is required to serve a probationary period upon initial appointment to a supervisory position. The supervisory probationary period is 1 year. An employee serving a supervisory probationary period at the time his or her permanent position is converted into NSPS will continue the probationary period in the new position; *i.e.*, the supervisory probationary period does not start over.

(1) *Crediting service toward completion of the supervisory probationary period.* (i) An employee who is reassigned, transferred, promoted or reduced in band from one supervisory position to another while serving a supervisory probationary period is subject to the probationary period prescribed for the new position. Service in the former position is credited toward completion of the probationary period in the new position.

(ii) Temporary service in a supervisory position prior to the supervisory probation when there is no break in service is creditable toward completion of a supervisory probationary period. This includes service on temporary promotion or reassignment to another supervisory position while serving a supervisory probation. Service in a non-supervisory position is not creditable.

(iii) Absence in an approved nonpay status while on the rolls (other than for compensable injury or military

duty) is creditable up to a total of 22 workdays.

(iv) Service during a supervisory probationary period from which an employee was separated or demoted for performance and/or conduct does not count toward completion of a supervisory probationary period required under a subsequent appointment.

(v) Absence (whether on or off the rolls) due to compensable injury or military duty is creditable in full toward completion of a supervisory probationary period upon restoration to Federal service under part 353 of this title.

(vi) An employee who has completed a supervisory probationary period prior to movement into an NSPS position is not required to complete another supervisory probationary period.

(2) *Failure to complete the supervisory probationary period.* (i) Except as described in paragraph (b)(2)(ii) of this section, an employee who, for reasons of supervisory performance, does not satisfactorily complete the probationary period is entitled to be assigned to a position at a grade or pay band and pay no lower than that held before assignment to the supervisory position.

(ii) A nonsupervisory employee who is reduced in band into a position that requires a supervisory probationary period and who, for reasons of supervisory performance, does not satisfactorily complete the probationary period is entitled to be reassigned to a grade or pay band no lower than that held when serving the supervisory probation. The employee is eligible for re-promotion in accordance with NSPS promotion rules under §9901.516.

(iii) The agency must notify the employee in writing that he or she is being assigned for failure to complete the supervisory probationary period.

(iv) *Appeals.* (A) A competitive service employee, who, in accordance with the provisions of this section, is assigned to a nonsupervisory position, has no appeal right, except as provided in paragraph (b)(2)(iv)(B) of this section.

(B) A competitive service employee who alleges that a Component action under this section was based on partisan political affiliation or marital

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status may appeal to the MSPB under 5 CFR 315.908(b).

(v) *Relationship to other actions.* (A) If an employee is required to concurrently serve both a supervisory and an initial probationary period, the latter takes precedence.

(B) An action that demotes an employee to a pay band lower than the one the employee left to accept the supervisory position, for reasons other than supervisory performance, is governed by part 752 of this title.

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§ 9901.514 Non-citizen hiring.

The Secretary may establish procedures for appointing non-citizens to permanent, temporary, or time-limited positions in the excepted service, provided there is a demonstrated absence of qualified U.S. citizens and applicable immigration and security requirements are met. Non-citizens may not be promoted, reassigned, or reduced in band, except in situations where a qualified U.S. citizen is once again unavailable.

§ 9901.515 Competitive examining procedures.

(a)(1) Under NSPS, applicants are appointed to career, career conditional, term, and temporary appointments in the competitive service using competitive examining procedures consistent with part 300, subpart A of this title. In recruiting applicants from outside the civil service for competitive appointments to competitive service positions in NSPS, Components with examining authority may use either numerical rating and ranking or alternative ranking and selection procedures (*i.e.*, category rating). Components must decide which procedures to use prior to issuing a vacancy announcement and include this information in the vacancy announcement.

(2) The Secretary will issue uniform policies, procedures, and guidance concerning competitive examining for NSPS within the Department and may delegate in writing authority for competitive examining for NSPS positions. All actions taken under competitive examining procedures will be made without regard to race, color, religion,

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age, gender, national origin, political affiliation, disability, sexual orientation, marital or family status, or other prohibited criteria, and will be based solely on job-related factors. These policies, procedures, and guidance will be consistent with the “Uniform Guidelines on Employee Selection Procedures” (1978) 43 FR 38290 (August 25, 1978) and part 332, subparts A and C of this title.

(b) *Public notice.* (1) Components will accept applications from all U.S. citizens, to include current Federal employees, and at a minimum, will consider applicants from the local commuting area. Components may concurrently consider applicants from other targeted recruitment sources, as specified in the vacancy announcement. A targeted recruitment source is a category or grouping of potentially qualified individuals, such as all students at a particular university in a particular field of study. Targeted recruitment sources will be selected with equal protection considerations in mind, such as whether the sources will reach a diverse applicant pool. If there are insufficient qualified candidates in both the local commuting area and targeted recruitment sources, Components may consider applicants from outside that area.

(2) When limiting consideration, the vacancy announcement will clearly state that consideration will be limited if sufficient qualified candidates are received from the local commuting area and other targeted recruitment sources. If sufficient candidates are not received from the local commuting area and other targeted recruitment sources, consideration will be expanded to all applicants; *i.e.*, the area of consideration will not be expanded incrementally.

(3) No minimum announcement opening period is required. The open period will be based on the type of position being filled and the availability of qualified candidates in the labor market.

(c) *Numerical rating and ranking procedures.* When filling positions using numerical rating and ranking, the procedures issued by the Secretary will be followed. All qualified applicants may be referred and selection may be made

from among any referred applicant except that a preference eligible will not be passed over to select a non-preference eligible, unless procedures under 5 U.S.C. 3318 for passing over a preference eligible are followed.

(d) *Alternative ranking and selection procedures (category rating).* When filling positions using category rating, procedures issued by the Secretary will be followed in lieu of the procedures in part 337, subpart C, except for § 337.304, of this title.

(e) *Passing over preference eligibles.* OPM retains the authority to grant or deny a pass over request of a preference eligible with a compensable service-connected disability of 30 percent or more and to make medical qualifications determinations pertaining to preference eligibles. The Secretary has the authority to grant or deny a pass over request of a preference eligible with a compensable service-connected disability of less than 30 percent.

§ 9901.516 Internal placement.

(a) *Determining levels of work and movement within and across career groups.* The determination of when an action is a promotion, reassignment, or reduction in band for competitive or noncompetitive movement and related pay administration purposes, either between NSPS positions or to an NSPS position from a non NSPS position, must be made by applying the definitions of those terms at § 9901.103.

(b) *Eligibility for promotion to full performance band.* An employee with a rating of record of Level 1 or Level 2 is not eligible for promotion to the full performance band of the position until such time as the employee attains a rating of record of Level 3 or above. An employee who does not have an NSPS rating of record may be promoted to the full performance band of the position if an authorized management official conducts a performance assessment and determines that the employee is performing at the equivalent of Level 3 or above.

(c) *Time after competitive appointment restriction.* Restrictions on the movement of an employee immediately after the employee's initial appointment to Federal service as described in 5 CFR

part 330, subpart E, are not applicable to NSPS positions.

(d) *Details.* There is no time limit on details or any requirement to extend them incrementally. An official personnel action is not required to document a detail unless the detail exceeds one year, crosses Component and/or Agency lines or assigns an employee from NSPS to another pay system within the Component (e.g., NSPS to General Schedule), or documents developmental rotational assignments or deployment.

(e) *NSPS Merit Promotion Program.* In accordance with the Secretary's authority to prescribe regulations for the assignment, reassignment, reinstatement, detail, transfer, and promotion of individuals or employees into or within NSPS, the procedures below, in conjunction with the merit promotion requirements in 5 CFR 335.103(b) constitute the NSPS Merit Promotion Program. Internal placement actions may be made on a permanent or temporary basis using competitive and noncompetitive procedures.

(1) All actions taken under the NSPS Merit Promotion Program, whether involving the identification, qualification, evaluation, or selection of candidates, will be made without regard to race, color, religion, age, gender, national origin, political affiliation, disability, sexual orientation, marital or family status or other prohibited criteria and will be based solely on job-related factors.

(2) Vacancy announcements will identify areas of consideration that are sufficiently broad to ensure the availability of high quality candidates, taking into account the nature and level of the positions covered. Employees within the area of consideration who are absent for legitimate reason (e.g., on detail, on leave, at training courses, in the military service, or serving in public international organizations or on Intergovernmental Personnel Act assignments) must receive appropriate consideration, if they apply for a vacant position; *i.e.*, they cannot be excluded from consideration because they are absent. Employees who are unable to apply for vacant positions while

they are away may also make other appropriate arrangements for consideration.

(3) To be eligible for promotion or placement, candidates must meet the minimum qualification standards prescribed by either OPM or the Department, as appropriate. Prior to the recruitment process, authorized management officials will identify through job analysis the job-related criteria that will be used to evaluate and determine the best qualified candidates for referral. The job analysis will identify the basic duties and responsibilities of the position being filled; the knowledge, skills, abilities, and/or competencies required to perform the duties and responsibilities; and the factors that are important in evaluating candidates. The job analysis may cover a single position or group of positions, or an occupation or group of occupations, having common characteristics. Candidate evaluation will give due weight to performance appraisals and incentive awards. When evaluating a candidate's performance appraisals, consideration may be given to the differences in performance appraisal systems. Job analysis requirements will conform to the Uniform Guidelines on Employee Selection Procedures in 29 CFR part 1607, and 5 CFR part 300, subpart A.

(4) Management has the right to select or not select from among a group of highly qualified candidates and to select from appropriate sources of candidates.

(5) Components will maintain a temporary record of each promotion to a competitive service position filled through internal competitive procedures to allow reconstruction of the placement action, including documentation on how candidates were rated, ranked, and referred. These records may be destroyed after 2 years or after the program has been formally evaluated by OPM (whichever occurs first) if the time limit for grievance has lapsed and destruction would otherwise be consistent with the Department's Priority Placement Program requirements.

(6) *Competitive actions.* (i) Except as provided in paragraph (e)(7) of this section, competitive procedures apply to promotion of an employee to a higher

pay band (*i.e.*, a higher level of work) and to the following actions:

(A) Temporary promotion or detail to a higher pay band for more than 180 days. Prior service during the preceding 12 months under noncompetitive temporary promotions or details to higher pay-banded positions counts toward the 180-day total. A temporary promotion may be made permanent without further competition, provided the temporary promotion was originally made under competitive procedures and the fact that the temporary promotion might lead to a permanent promotion was made known to all potential candidates;

(B) Reassignment or reduction in band to a position with more promotion potential than a position previously held on a permanent basis in the competitive service (except as permitted by reduction in force regulations at 5 CFR part 351);

(C) Transfer to a position at a higher pay band or with more promotion potential than a position previously held on a permanent basis in the competitive service; and

(D) Reinstatement to a permanent, term, or temporary position at a higher pay band or with more promotion potential than a position previously held on a permanent basis in the competitive service.

(ii) When determining whether the promotion potential of a General Schedule position is lower than that of the promotion potential of the NSPS position to which an employee moves, the definitions of higher, lower, and comparable levels of work under § 9901.103 will be applied.

(7) *Exceptions to competition.* (i) Competitive procedures do not apply to:

(A) Promotion resulting from the upgrading of a position to a higher pay band level without significant change in the duties and responsibilities due to the issuance of a new NSPS classification standard or the correction of an initial classification error;

(B) Promotion resulting from an employee's position being classified at a higher pay band level because of additional duties and responsibilities;

(C) Promotion resulting from previous competitive selection for a position with documented potential to a higher pay band;

(D) Temporary promotion or detail to a higher pay band or a position with known promotion potential for 180 days or less;

(E) Promotion to a higher pay band previously held on a permanent basis in the competitive service from which an employee was separated or demoted for other than performance or conduct reasons;

(F) Promotion, reassignment, reduction in band, transfer, or reinstatement to a position having promotion potential no greater than the potential of a position an employee currently holds or previously held on a permanent basis in the competitive service (or in another merit system with which OPM has an approved interchange agreement) and did not lose because of performance or conduct reasons;

(G) Consideration of a candidate not given proper consideration in a competitive promotion action;

(H) Placement resulting from reduction in force procedures under 5 CFR part 351; and

(I) The appointment of career SES appointees with competitive service reinstatement eligibility to any position for which they qualify in the competitive service at any salary level, consistent with 5 CFR part 317, subpart G.

(ii) When determining whether the promotion potential of a General Schedule position is lower than that of the promotion potential of the NSPS position to which an employee moves, the definitions of higher, lower, and comparable levels of work under §9901.103 will be applied.

(8) *Alternative promotion procedures.* The Secretary may authorize the use of the following alternative procedures to fill NSPS positions. Use of these alternative procedures does not require the posting of vacancy announcements; however, employees must be made aware that these processes may be utilized via newsletters, bulletin boards, websites, or other common methods of employee communication. Use of these alternative procedures is subject to the requirements of the DoD Priority Placement Program and the Reemploy-

ment Priority List. Employees within the area of consideration who are absent for legitimate reason (e.g., on detail, on leave, at training courses, in the military service, or serving in public international organizations or on Intergovernmental Personnel Act assignments) must receive appropriate consideration, *i.e.*, they cannot be excluded from consideration because they are absent.

(i) *Assessment boards.* (A) Boards may convene to assess internal candidates for current and future advancement opportunities based on pre-established criteria. Pre-established criteria may include experience, training, awards, education, performance evaluation scores (ratings of record) or other appropriate information consistent with merit system principles and the "Uniformed Guidelines on Employee Selection Procedures."

(B) Boards will categorize employees into specific levels of candidates to generate referral lists of ranked candidates for occupational groups. These referral lists are valid for one year from the date generated. Selection from the referral list should be further justified based on specific job-related factors unique to the actual vacancy.

(C) Boards, which should be comprised of senior level managers (subject matter experts for each particular occupational group), may be convened on an ad hoc basis or may be held annually in conjunction with the performance evaluation process.

(ii) *Alternate certification.* A selecting official may make a by-name request for an individual from any appropriate source of Department or Component employees. The employee may be selected if ranked within the highest quality group as determined by rating factors established for the position.

(iii) *Exceptional performance promotion.* (A) An employee whose most recent rating of record is a Level 5 performance rating may be promoted to a vacant position in a higher pay band when the vacant position has the same occupational series (or related interdisciplinary/interoccupational series) and similar function as the position the employee held at the time he or she received the Level 5 rating.

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(B) Selecting officials must determine and document the area of consideration, and must consider all employees in the area of consideration whose current Level 5 rating was based on performance in the same occupational series and similar function as the vacancy being filled.

(9) *Grievances*. Employees have the right to file a complaint relating to a

promotion action. Such complaints will be resolved under appropriate grievance procedures. The standards for adjudicating complaints are set forth in 5 CFR part 300, subpart A. There is no right of appeal to OPM, but OPM may conduct investigations of substantial violations of OPM requirements.